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THE  
MUNICIPAL CODE  
OF OHIO

INCLUDING

THE ACT OF OCTOBER 22 1902 WITH ALL AMENDMENTS  
AND SUPPLEMENTS THERETO AND ALL STAT-  
UTES RELATING TO MUNICIPAL CORPO-  
RATIONS TOGETHER WITH COMPLETE  
ANNOTATIONS OF DECISIONS AND  
ALL NECESSARY FORMS

---

BY

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THIRD EDITION

REVISED BY

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Of the Cincinnati Bar

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## PREFACE TO THIRD EDITION.

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In this edition of the Ohio Municipal Code, there are contained all the changes in and additions to the municipal code proper and the related statutes, made by the General Assembly at its session in 1906. The forms and orders of procedure have been changed, where necessary, to make them conform to the new laws. The annotations have been revised and brought up to date by the addition of all the decisions relating to municipal law rendered since the publication of the last edition, and many of the notes have been entirely rewritten.

Cincinnati, Ohio, November 1, 1906.

## PREFACE TO FIRST EDITION.

---

The purpose of this publication is to present in convenient form all the laws of Ohio affecting municipal corporations, together with annotations of the decisions thereon, compiled to April 1st, 1903, and all forms of ordinances, resolutions and procedure in conformity with the statutes as they exist since the enactment of the new municipal code.

Part I. consists of the new code proper, and all sections of the Revised Statutes re-enacted by it, incorporated at the places where such statutes should appear if made a part of the code itself. The sections of the new code are double leaded and those of the old statutes are set in solid type. The sectional numbers at the top of each page in Part I refer to the sections of the new code.

Part II. consists of all related statutes on the subject of municipal corporations not incorporated in the new code, nor expressly repealed by it. Many of these are doubtless repealed by implication; many others are unconstitutional, being of special application, but they are nevertheless contained herein in order that the entire body of statutes affecting the municipalities of the state may be found together.

The desirability of presenting this work for such service as it may render to the new city and village officials and to the bar of the state, at or before the time when the new municipal code goes into effect, has necessitated much haste in its preparation, and this fact is relied upon to secure a pardon for errors and imperfections.

In compiling this work the editor has been assisted by Mr. Ellis G. Kinhead and Mr. Challen B. Ellis, of the Cincinnati bar.

## ABBREVIATIONS.

---

|               |       |                                             |
|---------------|-------|---------------------------------------------|
| B.            | ..... | Weekly Law Bulletin, Ohio Law Bulletin.     |
| C. C.         | ..... | Ohio Circuit Court Reports.                 |
| C. C. (N. S.) | ..... | Ohio Circuit Court Reports (New Series).    |
| C. D.         | ..... | Ohio Circuit Decisions.                     |
| Clev.         | ..... | Cleveland Law Reporter.                     |
| C. S. C. R.   | ..... | Cincinnati Superior Court Reporter.         |
| D.            | ..... | Disney's Cincinnati Superior Court Reports. |
| Dayton        | ..... | Dayton Term Reports Digested.               |
| Dec.          | ..... | Ohio Decisions Nisi Prius.                  |
| Dec. (Re)     | ..... | Ohio Decisions (Reprint).                   |
| Fed.          | ..... | Federal Reporter.                           |
| H.            | ..... | Handy's Cincinnati Superior Court Reports.  |
| Gaz.          | ..... | Weekly Law Gazette.                         |
| Goebel        | ..... | Goebel's Probate Reports.                   |
| N. P.         | ..... | Ohio Nisi Prius Reports.                    |
| N. P. (N. S.) | ..... | Ohio Nisi Prius Reports (New Series).       |
| O.            | ..... | Ohio Reports.                               |
| O. F. D.      | ..... | Ohio Federal Decisions.                     |
| O. L. R.      | ..... | Ohio Law Reporter.                          |
| O. S.         | ..... | Ohio State Reports.                         |
| O. S. C. D.   | ..... | Ohio Supreme Court Decisions, Unreported.   |
| Rec.          | ..... | American Law Record.                        |
| Tappan        | ..... | Tappan's Reports.                           |
| U. S.         | ..... | United States Reports.                      |
| W. L. J.      | ..... | Western Law Journal.                        |
| W. L. M.      | ..... | Western Law Monthly.                        |
| Wright        | ..... | Wright's Ohio Supreme Court Reports.        |



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ELLIS'S ANNOTATED OHIO  
MUNICIPAL CODE.

---

INTRODUCTION.

---

SCOPE OF THE NEW CODE,  
WITH A STATEMENT OF  
THE CAUSES AND OCCASION  
OF ITS ENACTMENT.





## INTRODUCTION.

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The new municipal code of Ohio, passed by the General Assembly in extraordinary session on October 22, 1902, owes its origin to two sources: First, the agitation for a uniform government for the cities and villages of the state, begun by the Ohio State Board of Commerce, participated in by the State Bar Association and other organizations in 1898, and resulting in the passage of an act by the Seventy-third General Assembly authorizing the appointment of a municipal code commission; second, the decisions of the Supreme Court in June, 1902, declaring unconstitutional the then existing system of classification of municipalities as it had grown up during half a century, and thus at one stroke shattering the foundations upon which rested the special charters of nearly every city in the state.

These two influences, at once direct and potent, may well be termed the proximate cause for the passage of the new municipal code.

The bar of the state and many eminent judges had long been of the opinion that the classification of municipalities in Ohio, which had developed under the constitution of 1851, was a palpable evasion of that constitution, if not a violation of its express language. They believed that the intricate system which had so expanded as to permit, under the guise of classification, special legislation for particular cities, not only offended Section 26 of Article II, which declares that all laws of a general nature shall have uniform operation throughout the state, and Section 1 of Article XIII, which forbids the legislature to pass any special act conferring corporate powers, but violated Section 6 of Article XIII, which ordains that the General As-

sembly shall provide for the organization of cities and incorporated villages by general laws.

Constitutional limitations are seldom invoked to determine moot questions, or to allay the apprehension of remote evils. It is only when abuses become patent and oppressive that authority is sought to destroy them. Special legislation in Ohio would probably never have provoked that construction of the organic law of the state, which finally accomplished the overthrow of such legislation, if the power, many times sanctioned by the Supreme Court during the period of fifty years following the constitution of 1851, had been reasonably and moderately exercised. But every succeeding session of the General Assembly witnessed new refinements in the art of isolating municipal corporations for the purpose of controlling their affairs by special laws. Fourteen grades and classes of cities and villages had been created, and nine of these contained each but one city. The result was that every municipality in the state of any considerable size, was governed by a special act. The most trifling differences in population, or characteristics, were made to justify new classifications. When the number of classes and grades within them became so confusing as to discourage further amplification, particular cities were pointed out by such differentiating characteristics as that they contained a navigable stream, or were on the west side of a river, or embraced within their limits a park of a certain name, or offered other absurd distinctions, and laws were solemnly enacted conferring corporate powers upon those municipalities alone, and even with respect to matters far removed from the trivial peculiarity which served to point out the recipient of the power. More than this, the legislature, by an express enactment, in one instance, at least, evinced a determination to prevent the advancement of municipalities from one grade to another, under the operation of the rule of population, which the Supreme Court had sustained. In Section 1546 of the Revised Statutes, there was created a fourth grade of the first class of cities, and it was provided that "cities of the second class which hereafter become cities of the first class" should



constitute the fourth grade of said latter class. There was never any city of the fourth grade of the first class, and the only effect of the establishment of such a grade was to prevent cities of the second class from assuming the same form of government as other cities immediately above them, when they reached the same population. The confusion of laws thus became so bewildering that it was a task almost impossible of accomplishment to discover the rank or grade of particular cities.<sup>1</sup> In several cases this was the sole question before the Supreme Court. In *State ex rel. v. Wall*, 47 O. S. 499, the opinion begins as follows: "By the Court. After a careful consideration of the statutes regulating the organization of municipal corporations in this state, we are convinced that Columbus is a city of the first grade, second class." In *Hayes & Sons v. Cleveland*, 55 O. S. 117, the entire syllabus is as follows: "The city of Cleveland is a city of the second grade, first class." In view of the established rule of the Ohio Supreme Court that the syllabus, only, contains the propositions decided, the waste of time thus required to find the object upon which an act is to operate, which might better be devoted to construing the act, is itself a sufficient condemnation of the intricate system of classification that had grown up in this state.

The evils of such classification became more real as its purpose became more candid. The legislature was beginning wholly to usurp the duties of local councils. Home rule was being completely destroyed. The General Assembly determined for Cleveland, Cincinnati, Columbus, Toledo, Dayton and nearly every other city in the state, as well as for particular villages of even the smallest population, what officers they should elect, what salaries they should pay them, what parks, streets and hospitals they should build or improve, what their tax limit should be, what bonds they should issue and what powers each and every department of the municipal government should

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<sup>1</sup> See address, "The Municipal Situation in Ohio," read before the League of American Municipalities, at Grand Rapids, Mich., August 28, 1902, by Mr. William B. Doyle, of Akron, and published in 47 Ohio Law Bulletin, 739.

possess. Notes of warning had occasionally been sounded by the courts, but the long line of decisions upholding classification seemed to justify the sense of security displayed by the advocates of special laws in each succeeding session of the legislature. At last the protest of those who had long contended against such legislation took a concrete form. A number of influential commercial bodies of the state, as well as various organizations devoted to the cause of good government, took up the work of reform. While not appreciating so clearly the unconstitutionality of special legislation, they fully concurred with the bar in the opinion of its evil consequences; and it would be surprising, indeed, if a thing which the lawyers generally agreed was unconstitutional and the people generally agreed was wrong, should long survive such an agreement.

As a result of this agitation, led by the State Board of Commerce, there was passed, on April 25, 1898, "an act to authorize the governor to appoint a commission to revise the municipal code of the state, and making appropriations therefor." (93 O. L. 302.) This act provided that the governor should appoint two persons of different political parties who should constitute "the Municipal Code Commission," and whose duty it was made to prepare a bill for the reorganization of cities and villages in Ohio, uniform in operation throughout the state, and separating the legislative and executive departments of such municipalities. The act further provided that the commission should prepare the proposed measure in such form that it could be acted upon and adopted by the General Assembly, and should also prepare an explanation and analysis thereof, which, together with the bill, should be reported to the governor prior to the convening of the next succeeding legislature. The Governor was authorized to submit such bill to the General Assembly with such recommendations as he might deem proper. Governor Asa S. Bushnell appointed as members of this commission Judge David F. Pugh, of Columbus, and Mr. Edward Kibler, of Newark. This commission prepared a bill which became known as the Pugh-Kibler code, and which was very generally discussed throughout the state.

The chief features of the bill as originally drafted were as follows: It divided all municipalities into cities and villages, making cities of those having 3,000 or more inhabitants, and villages of the remainder. It provided for cities that the mayor, treasurer, president and members of council, police judge and clerk of the police court should be elected by the people, and that a department of accounts, department of law, department of public safety and department of public improvements, should each be managed by a single officer to be appointed by the mayor. In villages the general form of government previously existing was not in any essential respects modified. The merit system of appointments to the public service in all cities of the state was established, to be administered by a state commission appointed by the governor. A requirement was made for non-partisan ballots only, in all municipal elections; and municipal ownership of public service utilities, including street railway lines and telephone systems, was authorized. Nearly two years were spent in the preparation of this bill, and it contained 1,509 sections, adopting the numbers in Bates' Revised Statutes. The State Bar Association, at its meeting in the summer of 1900, appointed a committee to investigate the merits of the Pugh-Kibler code and to report to the next annual meeting its recommendations thereon, eliminating those features which provided for the non-partisan ballot and for municipal ownership of public utilities. This committee consisted of Messrs. Aaron A. Ferris, of Cincinnati, chairman; John W. Warrington and Harlan Cleveland, of Cincinnati; James R. Garfield, of Cleveland, and Charles T. Lewis, of Toledo. The committee made a report to the succeeding annual meeting of the Bar Association in 1901, and the bill, with some changes, was endorsed by the association, the committee being directed to promote its passage through the succeeding legislature. This bill, in the meantime, had been introduced in the 74th General Assembly in 1900,— and failed of passage. It was now introduced in a revised and shortened form at the regular session of the 75th General Assembly in 1902 and again failed of passage.



The hopes of the advocates of uniform municipal government seemed now indefinitely deferred. Not all these favored the particular plan proposed by the Pugh-Kibler bill, but they saw in the consideration of that bill, the prospect of ultimate relief from the abuses of special legislation. It was at this time, most opportune of all, that the ranks of those who had long contended against municipal classification, received the powerful accession of a united Supreme Court. For several years this court had been divided, Judges Shauck and Burket invariably dissenting from all decisions upholding classification, and the majority of the court, with the exception of Judge Minshall, in *State ex rel. Attorney-General v. Ratterman*, 58 O. S. 731, contenting themselves with following previous decisions without approval. The position of the court at this time is well stated by Judge Shauck in *State ex rel. Sheets v. Cowles*, 64 O. S., at page 179:

"It is quite true that many appeals for relief from such legislation have been made to this court, based on the claim that these beneficent provisions of the constitution should be put into practical operation. It is equally true that the doctrine of classification, or such isolation under the form of classification, has been adhered to. The reports show that a majority of the members of the court have regarded themselves as bound to pursue a course upon which our predecessors inadvertently started. \* \* \* These observations are made here only to show that a doctrine so completely discredited should not be extended. The present case is to be decided in deference to that doctrine and to the decisions upon which it rests. Some members of the court seem willing to have it understood that they really entertain such deference. Others of us are willing to assume it for the purposes of this case, as it will permit us to reach what we conceive to be the correct conclusion with respect to this legislation."

The same member of the court who wrote this opinion, and who now, at last, was enabled to announce, with the approval of an undivided court, that the doctrine of classification was discredited in Ohio, and would, at least, never be extended, was

he who as a circuit judge, nearly eight years earlier, had pronounced as earnest and convincing a condemnation of special laws as any to be found in the books. In *Carr v. The Village of West Carrollton*, 8 C. C. 1, Judge Shauck had under consideration an act authorizing "any incorporated village in the state of Ohio, which at the last federal census had, or at any subsequent federal census may have, a population of not less than 355, nor more than 365, to issue bonds," etc. At page 8 the Court says:

"Counsel for the defendants do not present any view of these constitutional provisions, and of this statute, which would, in their opinion, make them harmonious. The serious contention is that the authoritative decisions of the Supreme Court upon acts classifying municipalities require us to adjudge that the act is valid, though it be void. It is true that under the pretence of classification, all the large cities of the state have been isolated; that under cover of such 'classification' numerous special acts have been passed, each conferring corporate powers upon a single municipality, and that by repeated decisions, the Supreme Court has held such legislation to be valid. By this time, surely, we are inured to following these decisions as to the acts of classification which they uphold. But there are substantial reasons why we should not attempt to apply the principles of those decisions to this act. Our inability to comprehend those principles is so manifest to ourselves that to invoke them as authority for upholding an act that is in direct conflict with the plain provisions of the constitution would be mock deference. The decisions referred to do not stand well in the estimation of the Supreme Court itself. It is concerning the classification upheld by them that it is said in *State ex rel. v. Smith*, 48 O. S. 211: 'It must be conceded that the method of classifying cities for the purpose of legislation has been carried to the very verge of constitutional authority. Many conscientious minds believe that it has been exceeded.' Much more vigorous language would be required to express the opinion of that classification that is generally held by the bench and bar of the state, and by many other

intelligent citizens who seek better municipal government. It is well, if not widely known, that most of the eminent judges who participated in the decisions upholding such classification lived to regret the decisions and deplore the results which followed them."

To the point that these decisions upholding classification did not "stand well" in the estimation of the Supreme Court itself, there might have been cited the still earlier case of *State v. Wall*, 47 O. S., where the Court say, at page 500:

"Grave doubts may well be entertained as to the constitutionality of this method of classifying cities for the purpose of general legislation."

But following the emphatic position taken in the *Cowles* case, *supra*, which was decided in February, 1901, these "grave doubts" came rapidly to be strong convictions. Special acts, one after another, with ominous silence, were declared unconstitutional.<sup>2</sup> These unreported cases were followed by the decisions of *Platt v. Craig et al*, 66 O. S. 75, decided March 18, 1902, holding unconstitutional a special act authorizing the city of Toledo to build bridges over a navigable river, and *Cincinnati v. Trustees of Hospital*, 66 O. S. 440, decided June 24, 1902, declaring invalid a special law relating to the Cincinnati Hospital.

The 75th General Assembly was in regular session when some of these decisions were made, and their effect was to induce a caution in legislation which defeated many special acts, and insured the passage of several important measures giving general and uniform powers to the municipalities of the state. Among the most notable of these was the act providing boards of review for the equalization of tax valuations in all municipalities (95 O. L. 481); the codification of the health laws of the state (95 O. L. 421); the act for the abolishment of grade crossings (95 O. L. 356); the act providing for police and firemen's pension funds (95 O. L. 223), and the "Longworth bond act" providing a uniform power and method in the

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<sup>2</sup> *State ex rel. v. Ketter*, 45 B. 443; *Fenner v. Cincinnati*, 46 B. 188; *Cincinnati v. Willen*, 66 O. S. 633; *Cincinnati v. Alter*, 66 O. S. 669 and others.



issue of bonds for public improvements by all municipalities (95 O. L. 318); the last-named act being subjected to the test of constitutionality and held valid in *Guckenberger v. Henderson*, 66 O. S. 692.

Then came the sweeping decisions of June, 1902, which finally overthrew all classification of municipalities in this state as it had developed since the adoption of the last constitution. In the first of these cases (*State ex rel. Knisely v. Jones*, 66 O. S. 453), the constitutionality of an act providing for the reorganization of the board of police commissioners of the city of Toledo, and the appointment of such commissioners by the governor, was in question. The act applied to cities of the "third grade of the first class," and at the time of its passage, would have been operative in the one city alone. The tendency of the court was well understood by the eminent counsel who presented this case, and a last, strong effort was made to sustain the act upon the authority of the many former decisions upholding classification, and especially those cases in which acts almost identical in character had been adjudged constitutional. But an appeal to the mistakes of the past availed no longer. In a decision concurred in by every member of the court, except Judge Williams whose illness prevented his participation in any proceedings since the date of his last opinion on April 22, 1902, the court swept away every vestige of sham classification in Ohio, and now declared:

"In view of the trivial differences in population, and of the nature of the powers conferred, it appears from such examination [of numerous special acts], that the present classification cannot be regarded as based upon differences in population, or upon any other real or supposed differences in local requirements. Its real basis is found in the differing views or interests of those who promote legislation for the different municipalities of the state. An intention to do that which would be violative of the organic law should not be imputed upon mere suspicion. But the body of legislation relating to this subject shows the legislative intent to substitute isolation for classification, so that all the municipalities of the

state which are large enough to attract attention shall be denied the protection intended to be afforded by this section of the constitution."

In the Cleveland case (*State ex rel. Attorney General v. Beacom et al*, 66 O. S. 491), the act whose constitutionality was questioned was entitled, "an act to provide a more efficient government for cities of the second grade of the first class," (88 O. L. 105). A *quo warranto* suit was brought against the director of law, the director of public works, the director of police, director of fire service, director of accounts and director of charities and corrections of the city of Cleveland, constituting together the board of control of that city. The sole ground upon which a judgment of ouster was asked was that the defendants were assuming to act under a law limited in its operation to cities of the second grade of the first class. The court rendered a judgment of ouster, and in the concluding paragraph of its opinion used these words:

"But this is a public action, instituted and conducted solely for the protection of the public against injuries to result from infractions of the Constitution, and while a judgment of ouster must follow our conclusions, we think public considerations will justify such suspension of its execution as will give to those discharging the duties of the other departments of the government of the state an opportunity to take such action as to them may seem best, in view of the condition which the execution of our judgment will create; and this suspension will be until the 2nd of October, 1902."

There was here not only another unmistakable announcement that no special acts conferring corporate powers upon municipalities, as theretofore classified, would be upheld, but a significant suggestion was made to *those discharging the duties of the other departments of the government of the state to take such action as to them might seem best in view of the condition which the execution of this judgment would create.*

Perhaps, never before has such a condition prevailed in any state as that which suddenly confronted the people of Ohio in the summer of 1902. It was apparent that an extraordinary

session of the General Assembly must be called, and some action taken as promptly as possible to establish constitutional governments for the municipalities of the state. In addition to the chaotic condition of municipal affairs produced by these decisions, another sudden emergency had arisen, calling for immediate action. On the 12th day of May, 1902, the General Assembly had passed an act to amend Section 6710 of the Revised Statutes. The new act became known as "the Royer law." Its purpose was to enlarge the jurisdiction of the Supreme Court by removing the three hundred-dollar limitation in the amount necessary to be involved for the prosecution of error proceedings in that tribunal, but the result, by a blunder in the act, was to deprive the court of nearly all the appellate jurisdiction it had formerly possessed.

There was thus a double reason for the calling of the special session. Governor George K. Nash issued his proclamation on the 22nd day of July, 1902, and called the General Assembly to convene at 3:00 P. M., on August 25th, 1902. In the interim between the issuing of the proclamation and the assembling of the legislature, the Governor began the preparation of a bill providing a uniform government for cities and villages, in accordance with the evident requirements of the constitution, as indicated by the Supreme Court in the Cleveland and Toledo decisions. He requested Mr. Nicholas Longworth and Mr. Wade H. Ellis, of Cincinnati, to assist him in this work. The State Bar Association, then in annual session at Put-in-Bay, upon the request of the Governor, passed a resolution providing for the appointment of a committee to confer with the Governor and his assistants in the drafting of the proposed bill, and to review the work before its presentation to the legislature. President Wheeler, of the Bar Association, appointed on that committee Mr. John W. Warrington, of Cincinnati; Mr. Thomas H. Hogsett, of Cleveland, and Judge E. B. King, of Sandusky. During the progress of the work, the Governor and those engaged in preparing the proposed measure, had the advice and co-operation not only of this committee of the Bar Association, but of the leading members of both



political parties in the General Assembly, as well as Attorney-General Sheets, Mr. Smith W. Bennett, special counsel to the attorney general, and a number of prominent attorneys and city solicitors throughout the state.

The bill was submitted to the General Assembly with the Governor's message on August 25th, and became the affirmative recommendation of the chief executive. In effect, the bill was a part of the Governor's message, in accordance with the authority vested in him by Sections 7 and 8 of Article III. of the constitution of Ohio, the first of which requires that the Governor "shall communicate at every session, by message, to the General Assembly, the condition of the state, and recommend such measures as he shall deem expedient," and the second of which empowers him on extraordinary occasions to convene the General Assembly by proclamation, and state to both houses when assembled the purpose for which they have been convened.

The bill thus recommended by the Governor was introduced into the Senate by the Hon. Nicholas Longworth, of Hamilton County, and became "Senate Bill No. 1." It was introduced into the House by the Hon. A. G. Comings, of Lorain County, and became "House Bill No. 5." In the Senate it was discussed in committee of the whole, and after various amendments proposed by such committee, passed that body. In the House it was referred to a special committee composed of Messrs. Comings, of Lorain County; Painter, of Wood; Guerin, of Erie; Price, of Athens; Cole, of Hancock; Williams, of Hamilton; Metzger, of Stark; Thomas, of Huron; Chapman, of Montgomery; Allen, of Fulton; Silberberg, of Hamilton; Worthington, of Belmont; Denman, of Lucas; Hypes, of Clark; Willis, of Hardin; Gear, of Wyandot; Stage, of Cuyahoga; Bracken, of Franklin; Ainsworth, of Defiance; Maag, of Mahoning; Huffman, of Butler; Brumbaugh, of Darke, and Sharp, of Fairfield. This committee held public meetings from Wednesday, August 27th, to Thursday, September 10th, and was addressed by students of municipal government from various parts of the state, as well as from other states, by mem-

bers of the State Bar Association committee, by city and village solicitors, mayors, representatives of councils, boards of health, boards of public improvements, tax commissions, municipal associations, chambers of commerce, and like organizations.

The bill, with many amendments effecting important changes in the form of government and in the method of choosing officers, passed the House. The Senate bill as passed having been messaged to the House, the House sent it back with its own bill as an amendment. The Senate refused to concur in the amendments of the House, and returned the bill to the House. The House insisted upon its amendments and asked for the appointment of a conference committee, in accordance with the joint rules of the General Assembly. A conference committee was appointed to adjust the differences between the two houses, and consisted, on the part of the Senate, of Senators Longworth, Harding, Patterson, Archer and Harris, and on the part of the House, of Representatives Comings, Cole, Guerin, Denman and Sharp. In addition to the members of the conference committee, Lieutenant-Governor Gordon, presiding officer of the Senate, and Hon. W. S. McKinnon, Speaker of the House, were present during the work of the committee. The report of the conference committee was unanimous, was concurred in by both houses, and the bill was passed on October 22nd, 1902.<sup>3</sup>

It is, perhaps, not beyond the fact to say that the passage of a general law for the organization of municipal governments, and the distribution of their powers, in obedient recognition of

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<sup>3</sup> The execution of the judgment of ouster in the Cleveland case, *supra*, had been suspended until October 2, 1902, and the new Code not having passed until October 22, and not providing new governments for the municipalities until the first Monday in May, 1903, it was necessary to further suspend the operation of this judgment. On November 8, 1902, execution was suspended until the further order of the court. 47 Bulletin, 833. In a later case, *State ex rel. v. Spellmire et al.*, 48 B. 42, where the Supreme Court held unconstitutional an act establishing a special school district, Judge Burket, delivering the opinion, suggested that the execution of the judgment could be suspended as in the Cleveland case. "And thereby," he observed, "'the wind is tempered to the shorn lamb.'"



constitutional command and limitation, signalizes the most important epoch in the history of such governments in this state. Nor does it seem improper to add that the assumption of such a work by the legislature of Ohio must have a large influence in directing attention to the increasing importance of municipal affairs throughout the United States, and must suggest the question of how far the problems of reform may be advanced by the codification of statutes relating to the government of cities and villages, and the substitution of one uniform law for the multiplex system of special charters. The new experiment which Ohio is now to make will be watched with peculiar interest because of the fact that while this state has been a conspicuous sufferer from the ills of special legislation, it has also more than once led the way to an escape from such ills by the unification of municipal laws. More than fifty years ago the legislature of this state passed a municipal corporations' act, the first of its kind in this country.<sup>4</sup> The municipal code of May 3, 1852 (52 O. L. 223), comprising 111 sections, provided for the organization of cities and villages, and divided cities into two classes based upon population. One hundred and eighty-four acts<sup>5</sup> were passed amending or supplementing this law prior to the adoption of the municipal code of May 7, 1869, (66 O. L. 149). This later code comprised 731 sections, and continued the previous system of classification, which was not enlarged or modified until the revision of the statutes in 1880. The revision introduced the subdivision of grades into the two classes of cities provided by the codes of 1852 and 1869, and special charters were thus created for the five largest cities of the state.<sup>6</sup>

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<sup>4</sup> See article "Municipal Crisis in Ohio," in *Michigan Law Review* for February, 1903, by Dr. John A. Fairlie, Professor of Administrative Law in the University of Michigan.

<sup>5</sup> See *Seifert v. Weidner*, 12 C. C., at pages 11 and 12.

<sup>6</sup> See preface to Revised Statutes of 1880, page IX, where it will be observed that the revision commissioners were firmly of the opinion that appropriate local legislation could be provided for any municipal corporation, designated by the number of its inhabitants or even by being directly named, and that where corporate power was conferred the constitution was satisfied, however intricate the classification, provided the plan adopted permitted all cities without change of the statute to pass by growth of population from one grade to another.

The marvellous growth of urban population in Ohio during the last fifty years has been, perhaps, a more potent factor than all others in accelerating the various movements for municipal reform, in inducing a closer analysis and criticism of the several codes and revisions heretofore adopted, and particularly in directing a more careful scrutiny of the constitution of 1851, to the end that its provisions might answer the universal appeal for protection against the tyranny of special laws. The modern trend of population toward the cities could not have been foretold half a century ago, and it is not surprising that a convention assembled to make the organic law for a distinctively agricultural state, at a time when the present perplexities of municipal administration were far too remote to provoke concern, and when the development of the Middle West presented other issues immediate and insistent, had no committee on municipal corporations, but contented itself with referring the most vital questions affecting city government to the "Committee on Corporations other than banking."<sup>7</sup> In 1850, the total population of Ohio was 1,980,329, and the total population of all incorporated municipalities was 373,828. In other words, more than five times as many people lived in the country as in the cities and villages. In 1900, the total population of Ohio was 4,157,545, and the total population of all cities and villages in the state was 2,412,352. That is to say, considerably more than one-half the whole number of inhabitants in the state now live in the municipalities. These figures tell their own story. They show that while the total population of the state has increased during the last fifty years about one hundred per cent., the population of the cities and villages has increased about seven hundred per cent. When the constitutional convention of 1851 met in Cincinnati, that city had a population of 115,435, which was nearly three times the combined population of Cleveland, Columbus, Dayton and Toledo, and

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<sup>7</sup> Section 6 of Art. XIII, ordaining that "the General Assembly shall provide for the organization of cities and incorporated villages by general laws," etc., emanated from this committee. So also did section 1, which forbids the legislature to pass any special act conferring corporate powers. (1 Debates, 260.)

about twice the then total population of what are now, excluding Cincinnati, the ten largest cities in the state.<sup>8</sup>

It is small wonder, therefore, that the debates of the convention and the assignment of committees do not disclose the question of municipal government as a prime subject of discussion. But the enormous increase in the numerical strength of such corporations during the past fifty years, and the many object lessons in this state of their power for ill when made the buffet of alternating political majorities through a central legislative authority, have stimulated a study of the constitution of 1851, and revealed the fact that the members of that convention had a somewhat clearer vision of the dangers of special laws for the government of municipalities than the advocates of such laws have been willing to believe. In the early days of classification it was denied that Section 1 of Article XIII, had any application whatever to municipal corporations.<sup>9</sup> But the fact soon became accepted, and the published debates of the convention establish it beyond controversy. When this section was reported by the committee, determined efforts were made to amend it, and some of these for the sole purpose of preventing its application to municipal corporations. After the words, "the General Assembly shall pass no special act conferring corporate powers," it was proposed by Mr. Henry Stanbery, then a resident of Columbus, to add these: "except for municipal purposes, or where the objects cannot, in the opinion of the General Assembly, be

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<sup>8</sup> The following table, showing the growth of the ten largest cities in the State since 1850, indicates most strikingly the trend of population toward the municipalities:

|                   | 1850.   | 1900.     |
|-------------------|---------|-----------|
| Cleveland .....   | 17,034  | 381,768   |
| Cincinnati .....  | 115,435 | 325,902   |
| Toledo .....      | 3,829   | 131,822   |
| Columbus .....    | 17,882  | 125,560   |
| Dayton .....      | 10,977  | 85,333    |
| Youngstown .....  | 2,802   | 44,885    |
| Akron .....       | 3,266   | 42,728    |
| Springfield ..... | 5,108   | 38,253    |
| Canton .....      | 2,603   | 30,667    |
| Hamilton .....    | 3,210   | 23,914    |
| Total .....       | 182,146 | 1,230,832 |

<sup>9</sup> State *ex rel.* Attorney General v. Cincinnati, 20 Ohio State, 18.



attained under general laws." This was similar to provisions in the constitutions of New York and Wisconsin.<sup>10</sup>

A further attempt was made to limit the operation of this section by adding these words, "except for such municipal and charitable purposes, as, in the opinion of the General Assembly, cannot be attained by general laws,"<sup>11</sup> and finally, Mr. William S. Groesbeck, of Cincinnati, proposed an amendment simply adding the words, "except for municipal purposes." All these amendments were defeated, Mr. Groesbeck's by the close vote of 45 to 43. Then a motion was made to strike out the whole section, which was lost, and the section was adopted as it stands to-day by a vote of 55 to 40.

Commenting upon the significance of these proceedings of the Constitutional Convention, the Supreme Court, in a recent case,<sup>12</sup> makes this interesting observation: "The amendment having failed, adjudications upon this subject should not proceed as though it had been adopted." Yet adjudications had so proceeded for a great many years, despite the fact that the court had more than once affirmed the application of this section to municipal corporations. A closer consideration of Section 26, of Article II., ordaining that "all laws of a general nature shall have uniform operation throughout the state," and Section 6, of Article XIII, which requires that "the General Assembly shall provide for the organization of cities and villages *by general laws*," etc., further emphasizes the fact that the constitutional convention had immediately in mind the evils of special acts, as well when applied to municipal corporations as when affecting any other subject or interest in the state. And this is made more apparent by a consideration of the public history of the times and the great number of special acts affecting municipal corporations, passed at sessions of the legislature held shortly before the adoption of the present constitution.<sup>13</sup>

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<sup>10</sup> Vol. 1, Constitutional Debates, p. 355. See also article on "Special Legislation," 47 Ohio Law Bulletin, p. 673.

<sup>11</sup> Vol. I., Constitutional Debates, p. 362.

<sup>12</sup> Cincinnati vs. Trustees of Hospital, 66 Ohio State, 440, 447.

<sup>13</sup> State *ex rel.* Knisely *et al.* v. Jones *et al.*, 66 Ohio State, 453, 489.

And now when the opportunity came to be rid forever of the bane of classification and establish one uniform law for the government of municipalities, the extraordinary session of the General Assembly of Ohio which Governor Nash had called, was confronted with many diverse plans to meet the emergency, and several bills, differing radically in scope and purpose, were presented, in addition to the one drawn at the instance of the Governor, and which formed the basis of the act finally passed. Many able and conscientious men who had given the subject attention believed that the General Assembly could, without violating the Constitution, empower the cities and villages of the state, each for itself, to determine their several organizations. Others believed that the legislature should simply authorize the holding of local conventions in each municipality, in which the people thereof should determine not only the form of their government, but what powers should be exercised by it, limited only by constitutional restrictions.<sup>14</sup>

A third number proposed to continue the classification of municipalities, but to base the same upon substantial differences in population, and thus, as was believed, avoid the barrier of the Supreme Court.<sup>15</sup> Still others, while not agreeing to any of these propositions, opposed the bill recommended by the governor because they were of the opinion that it divided responsibility for misrule or extravagance by requiring the chief officers to be elected by the people, whereas, in their judgment, the so-called federal plan, which is generally understood to mean the election of a mayor and council by the people and

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<sup>14</sup> The contention for either of these views involved affirmance of the proposition that the legislature could delegate to the municipalities the power to set up diverse forms of government and thus to exercise an authority which the Supreme Court had held the legislature did not itself possess. See Governor Nash's message, APPENDIX. On the other hand, it was clear that the General Assembly could provide in detail the organization for all cities and villages. *State ex rel. v. Hawkins*, 44 O. S. 98, 110.

<sup>15</sup> The result of this contention was the passage of a joint resolution, at the same extraordinary session which passed the new municipal code, submitting to the electors of Ohio at the November election in 1903 a proposed amendment to the constitution, which, if adopted, would empower the legislature to divide the cities of the State into three classes based upon population. See APPENDIX.



the appointment by the mayor of the heads of all executive departments with power to remove at will, offers the best form of municipal government.

The legislature was unwilling to hazard the constitutionality of either the first, second or third of these plans, while a disinclination to try an experiment as yet unfamiliar to the great body of the people of the state,<sup>16</sup> as well as a predisposition in favor of existing forms, prevented the adoption of the fourth. The bill which finally passed was not in any large sense a compromise of conflicting views or measures, yet it differs in many essential respects from the original draft submitted by the governor, and contains numerous important provisions suggested by other bills presented at the same session.

This new municipal code may more properly be called a re-adjustment of existing laws. Its chief purpose is to provide a uniform and constitutional government to be assumed at the earliest practicable moment by all the cities and villages of the state. Its leading features are an adoption of forms and institutions long established in Ohio. For example, the election directly by the people of the various municipal officers is a custom among the earliest in this state and never departed from except in the instance of special charters for two cities. An administrative board, such as the board of public service under the new code, is also one of the oldest institutions in the history of municipal government in Ohio. It was a part of the first code ever enacted, a part of the second, and is to be found in nearly all recent laws providing special governments for the various cities of the state. The General Assembly which passed the new code has been accused of foregoing a favorable opportunity to engraft upon the statute books an ideal form of municipal government; and while the most impatient criticism has usually come from scholarly citizens of those states which are farthest in the rear of Ohio in municipal advancement, the real answer to such a complaint is found in the fact that the emergency which confronted the extraordinary session demanded prompt action, and it would have been unwise in the face of that

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<sup>16</sup> The cities of Cleveland and Columbus alone had such a form of government.

emergency to long debate academic questions. What was needed was a form of government which would permit the municipalities to continue to exercise their functions; which would allay the uncertainty and disquietude existing all over the state, and provide the foundation upon which a completed structure might be erected, with full deliberation and with the advantage of practical experience.

But while the new code is not all that advanced students of city government desire, it is a long step in the right direction. Every departure from existing institutions is in harmony with the spirit of advancement. The legislative and executive departments are separated by a clear line. Responsibility for official misconduct is more fixed and certain. The merit system and civil service are firmly established in the police and fire departments of every city, and these departments are secured against all political influence or control. A substantial portion of the membership of council will be elected at large, thus insuring a better character of men than are sometimes chosen from wards.

The mayor is made the real head of the local government. He appoints all chief officers not elected by the people, including the tax commissioners or sinking fund trustees, the directors of public safety, who have charge of the police and fire departments, the members of the board of health, the university and library trustees, and others; and is empowered to suspend for misconduct or incapacity any officer or head of department in the municipal government, pending charges which he is authorized to file with council. He appoints, subject to the civil service regulations, all policemen and firemen. He fills all vacancies in any office until the next regular election. He has the veto power over every ordinance passed by a city council. He prepares the annual budget for the city's expenditures, and every officer and head of department is required to submit to the mayor detailed statements and estimates of the needs of his branch of the government. The mayor may take charge of any department at any time and appoint examiners to investigate all its affairs; and in various other ways he has

large supervisory powers. In the making of public contracts the powers of council and the board of public service are sharply distinguished. With respect to the deposit of public funds provision is made for competitive bidding and the treasurer of every municipality is made responsible for any loss unless such funds are deposited in conformity with this requirement. The number of officers provided for the cities and villages is less than ever before, and their compensation is to be fixed by the local councils only.

But the most important advance is in the assurance of the greatest measure of home rule permitted by the constitution. Heretofore the organization, the number of officers and their salaries, the authority to make public improvements, and to borrow money, and nearly all the powers and functions of municipal corporations in this state were fixed in special acts passed by the legislature. Representatives in one part of the state were asked to put upon the people living in another a government for their home towns without the consent of the people themselves, either as to the cost of such government or the method of its administration. Members of the General Assembly who desired, for political reasons, to oust a particular board or officer in their home city, found little difficulty in securing the aid of other members in reciprocation of support for a similar measure. Extravagant bond issues were foisted upon the people of particular communities, often without their knowledge and more frequently without their consent. Thus a delegation elected to the General Assembly from a particular city in a fall campaign, where municipal questions were not in issue and were not discussed, usurped the place of councils elected in campaigns where municipal questions and municipal expenditures are discussed and are often the chief issues before the people. Under the uniform law now established, so-called "ripper" legislation will be at an end. Legislative log-rolling will cease. Each municipality will have the best form of government that any one possesses. Evils and abuses will excite universal concern, and the remedy for them will elicit universal support. Each municipality will profit by the ex-



perience of every other. The courts will be relieved from the drudgery of ascertaining what law governs a particular city, and will take up the more important employment of construing the law which governs all cities. Consistent and harmonious adjudications will result. A decision which affects the powers of officers in Cleveland, or the method of procedure in the levying of taxes, assessments, or the appropriations for public expenditures in Cincinnati, will be of equal interest in Columbus, Toledo and Dayton.

The new municipal code contains many imperfections. These are due, first, to the limited time in which an extraordinary session of the legislature could consider it and the number of committees through whose hands it passed; and secondly, to the fact that existing forms and institutions are hard to displace, and the people generally hold with jealous tenacity to laws with which they have been long familiar and look with suspicion upon new experiments. Even in the work which the General Assembly undertook to perform a great deal was left uncompleted, and a labor of immediate importance to the state will be the embodying of all statutes on the subject of municipal corporations in one harmonious act, which should be codified with appropriate sectional numbers and made to constitute title XII of the Revised Statutes.

Imperfect, however, as is the new act, it restores constitutional government to the municipalities, and presents the basis for ultimate efficiency. The hapless pathway behind us is closed forever, and this alone should encourage and inspire all those who have a healthy confidence in the ability of American citizenship to work out the problems of municipal reform.

WADE H. ELLIS.

Cincinnati, May 1, 1903.



ELLIS'S ANNOTATED OHIO  
MUNICIPAL CODE.

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PART I

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THE NEW CODE PROPER  
AND ALL SECTIONS  
OF THE REVISED STATUTES  
RE-ENACTED THEREIN.



# THE NEW MUNICIPAL CODE.



## I

### CLASSIFICATION OF MUNICIPALITIES.

#### 1. GENERAL PROVISIONS.

**Sec. 1.** [Division into cities and villages.] All municipal corporations, which, at the last federal census, had a population of five thousand or more, shall be cities. All other municipal corporations shall be villages. All cities which, at any future federal census, have a population of less than five thousand shall become villages. All villages which, at any future federal census, have a population of five thousand or more, shall become cities.<sup>1</sup>

(1) **Title.**—The new code is entitled "An act to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent the abuse of such powers, as required by the Constitution of Ohio, and to repeal all sections of the Revised Statutes inconsistent herewith." This title adopts the language of § 6, Art. 13, Const. of Ohio. In *Parsons v. Columbus*, 50 O. S., 460, it is held that the duty imposed by this section of the Constitution with respect to restrictions upon municipalities is addressed to the conscience and judgment of the legislature, and is not the subject of judicial correction.

**Title as aid in construction.**—The title of an act may be considered to explain its object and remove ambiguities. *Burgett v. Burgett*, 1 O.

469, 480; *Steamboat Monarch v. Finley*, 10 O. 384, 387; *State v. G. A. Society*, 11 O. 1, 10; *L. B. Society v. Lewis*, 7 O., 1st part, 80, 86; *Hogg v. Zanesville C. & M. Co.*, 5 O. 410, 415; *Burgunder v. Weil*, 60 O. S. 234, 242; *Hall v. Siegrist*, 13 Dec. 46.

**Validity of Act.**—The new municipal code was held to be constitutional and to have been properly and regularly passed in *Zumstein*, a taxpayer on behalf of the City of Cincinnati, *v. Mullen et al.*, 48 B., 117; 67 O. S. 382.

**Classification.**—*Present and former.*—The division of all municipal corporations into cities and villages marks a new departure in the municipal law of Ohio, under the Constitution of 1851. The Municipal Code of 1852 (50 O. L. 223-237) divided municipal corporations into four classes, viz., cities of the first class, cities of the second class,

incorporated villages and incorporated villages for special purposes. The Municipal Code of 1869 (66 O. L. 149) provided the same classification as that of 1852. The establishment of grades within the two classes of cities, the division of grades into first, second, third, etc., and the subdivision of particular grades have been matters of gradual growth. The most recent statute governing classification, previous to the enactment of the new code, was passed in 1898 (§ 1546 R. S., 93 O. L. 601) and divided municipal corporations into 14 classes, viz., cities, villages and hamlets; cities being divided into two classes, first and second, the first class being divided into three grades, first, second and third, with provision for a future fourth; and the second class into eight grades, first, second, third, third a, third b, third c, fourth and fourth a. Villages had previously been divided into a first and second class (§ 1549 R. S., 89 O. L. 302.) There were never any *towns* in Ohio, established by the legislature under the Const. of 1851, although § 30 of Art. II and § 6 of Art. VIII recognize a class of municipal corporations to be so designated.

*Decisions on classification.*—Until the decisions of June, 1902, which brought about the extraordinary session of the Ohio legislature and the enactment of the new Municipal Code, the Supreme Court had uniformly upheld the classification of cities for purposes of organization and distribution of powers. *State ex rel. Atty Gen. v. Covington*, 29 O. S. 102; *State v. Brewster*, 39 O. S. 653; *State v. Pugh*, 43 O. S. 98; *State ex rel. v. Hawkins*, 44 O. S. 98; *State ex rel. v. Hudson*, 44 O. S. 137; *Marmet v. State*, 45 O. S. 63; *State ex rel. v. Cincinnati*, 52 O.

S. 419; *State ex rel. v. Rattermann*, 58 O. S. 731. Acts relating to particular grades and classes of cities were, when attacked on constitutional grounds, subjected to the requirements of § 26 of Art. 2, ordaining that all laws of a general nature shall have uniform operation throughout the state, and § 1 of Art. 13, forbidding the General Assembly to pass any special act conferring corporate powers. If the subject matter of an act was one of general interest and concern, and the act was restricted in operation to a class or grade of cities it was void. *Cincinnati v. Steinkamp*, 54 O. S. 284; *State ex rel. v. Ketter*, 45 B. 443; *State ex rel. v. Cowles*, 64 O. S. 162. Even though an act conferred corporate power, however, and was special in the sense that it operated in but one city of the state, it was upheld if it operated uniformly within the grade and class to which it was made to apply. *State ex rel. v. Baker*, 55 O. S. 1; *Alter v. Cincinnati*, 56 O. S. 47; *State v. Toledo*, 48 O. S. 112; *State ex rel. v. Cowles*, 64 O. S. 162. But the classification was required to be reasonable and not illusory or arbitrary. *Costello v. Wyoming*, 49 O. S. 202; *Bronson v. Oberlin*, 41 O. S. 476. The later decisions, preceding those in the Cleveland and Toledo cases in June, 1902, discredited the doctrine of classification for any purpose by refusing to extend it, and prepared the way for its final overthrow. *Geier v. Cincinnati*, 63 O. S. 568; *Cincinnati v. Trustees of Hospital*, 66 O. S. 440; *Cincinnati v. Willen*, 66 O. S. 633; *State ex rel. v. Cowles*, *supra*. In the Cleveland and Toledo cases (*State ex rel. Atty. Gen. v. Beacom*, 66 O. S. 491, and *State ex rel. Knisely v. Jones*, 66 O. S. 453)



the acts in controversy provided a different organization or agency for exercising municipal powers in the one city from that provided elsewhere in the state. Similar acts had been upheld in earlier cases cited above. But the court now declared that classification as it had developed in Ohio, had become "isolation," and had ceased to have any basis in differences of population or local requirements, and refused to recognize such classification as effectual to designate recipients of municipal powers, whether in the strict sense such powers are governmental or corporate. It seems unquestionable that the effect of these decisions is to hold unconstitutional for any and all purposes the classification of municipalities in this state, as the same was in force immediately prior to the passage of the Code of 1902. It is not so certain that these decisions justify the contention that a reasonable classification of municipalities, based on substantial differences in population, would be held unconstitutional.

*What classification permissible.*—Whether the exclusive classification of municipal corporations into cities and villages, provided for in § 1 of the new Code, is the only one that would be permissible under the Constitution has not been decided by the Supreme Court. In the Toledo case (66 O. S. 453), the court distinctly announces that the question whether the provisions of § 6, Art. XIII, of the Const. of Ohio, ordaining that the legislature "shall provide for the organization of *cities and villages* by general laws," mean to prohibit any other classification, is not decided. The question was also left open in *C. L. & A. Ry. Co. v. North Bend*, 70 O. S. 46. The extraordinary session of

the General Assembly, in 1902, adopted a resolution, submitting to the electors of Ohio, at the November election, 1903, a proposed amendment to the Constitution, which would have empowered the legislature to divide the cities of the state into three classes, based upon population (see 96 O. L. 117). This amendment was lost by a decisive vote.

**Status of Hamlets.**—The municipal code of 1902 did not recognize hamlets except as it did not specifically repeal those sections of the Revised Statutes relating to their creation, government and powers and except as § 100 of the Code re-enacted the "Longworth act," as passed by the regular session of the 75th General Assembly, April 29, 1902, (95 O. L., 318), which then authorized the issue of bonds for public improvements by "cities, villages, *hamlets* and townships." Hamlets were included in former classifications. (§ 1546 R. S., 93 O. L. 601, repealed.) They were recognized by the statutes as municipal corporations (§ 1550 R. S., repealed) and held to be such in *Annexation of Newburgh*, 15 C. C. 78, and *State ex rel. v. Wagar*, 19 C. C. 149, 151. Section 1549 R. S., repealed by the Code, seems to have made hamlets of all municipal corporations having less than 200 inhabitants.

The session of the legislature in 1906 amended the Longworth Act and left out all reference to hamlets. On the other hand, the same session amended one of the sections relating to hamlets so as to make it conform to the act relating to street commissioners and road supervisors. But notwithstanding the amendment referred to and the failure to repeal the hamlet statutes, it would seem that the new

code abolished hamlets and made them villages instead.

Municipal corporations, therefore, which were hamlets before the enactment of the new code, have now become villages and must elect such officers and exercise their governmental functions in such manner, as provided in the Code for villages, or surrender their corporate powers as authorized therein.

Hamlets which, after the new Code went into effect, failed to elect village officers as provided in the Code, were held to have become villages nevertheless, and the hamlet officers were held to be acting as village officers, until the election and qualification of the proper village officers. *C. L. & A. St. Ry. Co. v. North Bend*, 70 O. S. 46.

Thus, it was held in the case of

the hamlet of North Bend that under the new code it became a corporate village notwithstanding it had not elected the proper village officers, and that a street railway was without authority to construct a railway on or above the streets without the consent of the existing officers of the municipality. *C. L. & A. St. Ry. Co. v. North Bend*, 70 O. S. 46.

See further as to whether the powers conferred on councils of villages by the code may be exercised by trustees of hamlets until the proper village officers have been elected. *State ex rel. v. Wagar*, 19 C. C. 149; *In re Annexation of Newburgh*, 15 C. C. 78; *Carey v. State*, 70 O. S. 121. See also as to status of hamlets prior to new code, *Billington v. Hoverman*, 18 C. C. 637.

**Sec. 2. [Proclamation of Secretary of State; advancement and reduction of municipalities.]**<sup>1</sup> When this act takes effect, and whenever the result of any future federal census is officially made known to the secretary of state, he shall forthwith issue a proclamation, stating the names of all municipal corporations having a population of five thousand or more, and the names of all municipal corporations having a population of less than five thousand, together with the population of all such corporations.<sup>2</sup> A copy of said proclamation shall forthwith be sent to the mayor of each municipal corporation, which copy shall be forthwith transmitted to council, shall be read therein and made a part of the records thereof, and from and after thirty days after the issuance of said proclamation each municipal corporation shall be a city or village, in accordance with the provisions of this act. All officers of a village advanced to a city, or of a city reduced to a village, shall continue in office until succeeded by the proper officers of the new corporation at the next regular

election, and the ordinances thereof not inconsistent with the laws relating to the new corporation shall continue in force, until changed or repealed.<sup>3</sup>

(1) **Old Sections.**—Compare §§ 1617–1622 R. S., repealed, relating to the duties of certain state officers to determine what municipalities were to be advanced or reduced in grade or class, and §§ 1581 and 1588 R. S., repealed, relating to officers continuing in office and ordinances remaining in force pending advancement of hamlets, villages and cities.

(2) **List of cities and villages.**—For complete list of cities and villages under the new Code, with the population of each, as shown by the first proclamation of the Secretary of State, see Appendix.

The first proclamation was issued November 17th, 1902, and showed 71 municipal corporations with 5,000 or more inhabitants, and 613 with less than 5,000.

(3) **Officers holding over.**—Where officer is authorized to hold his office after expiration of term until a successor qualifies, there is no vacancy during such period, and incumbent holding over is a *de jure* officer. State ex rel. v. Howe, 25 O. S. 588.

Where officer legally holds over until a successor qualifies, he holds on as of his old term. State ex rel. v. Killits, 8 C. C. 30.

Whether sureties on officer's bond can be held for such extended term, *quere.* Ib.

Officer does not hold over unless a successor is provided for. McHugh v. Cincinnati, 1 C. S. C. R. 145.

Officer removed for misconduct cannot hold over under law authorizing incumbent to continue in office until his successor is elected or ap-

pointed. State ex rel. v. Hawkins, 44 O. S. 98, 117.

Where a new code provided for one officer who was to perform the duties theretofore performed by three under the previous act, the office of the three was held abolished. McHugh v. Cincinnati, 1 C. S. C. R. 145.

Where a new code created a new office, but made no provision for filling it, it was held there was a vacancy until the next annual election, and the person elected to the office held only until the next annual election. State ex rel. v. Cook, 20 O. S. 252.

The constitutional provision against affecting the salary of an officer during his existing term, does not apply to an officer holding over until his successor is elected and qualified. Woehler v. Toledo, 6 B. 282.

Where an office is abolished by a new law, if the duties of the office were specific and limited and not continuous during the year, the annual salary must be apportioned, not by the time of service, but by the duties actually performed, and therefore may be wholly earned at the time of abolishment of the office. *Ex parte* Lawrence, 1 O. S. 431. Mandamus will not lie at the suit of one claiming succession to an office unless the act under which he claims is valid, and this is true, although defendant's title may also be invalid. State ex rel. v. Jones, 66 O. S. 453.

**Ordinances continuing in force.**—Only such ordinances would con-



tinue in force, as, if passed under the new code, would be authorized by its provisions. See *Neff v. Bates*, 25 O. S. 169; *Hubbard v. Norton*, 28 O. S. 116.

On the other hand, an ordinance formerly passed but not authorized by the laws then in force would not be valid, even though authorized by the new code, notwithstanding the provision continuing in force all former ordinances not inconsistent with the new code. *Cotter v. Doty*, 5 O. 393, 398.

An ordinance that was unconstitutional would, of course, not be continued in force. See *Zanesville v. Auditor*, 5 O. S. 590.

An ordinance fixing a salary would continue in force, if the authority passing the ordinance has the power under the new code and the salary does not exceed the maximum provided by the new code, even though the law under which the ordinance was passed is repealed by the code. *Moore v. Cincinnati*, 26 O. S. 582.

An ordinance providing for the annexation of contiguous territory not inconsistent with a new code was held to continue in force under a provision such as that in the present code. *Croll v. Franklin*, 40 O. S. 340.

**Sec. 3. [Merger of township in municipality.]**<sup>1</sup> When the corporate limits of a city or village become identical with those of a township, all township offices shall be abolished, and the duties thereof shall thereafter be performed by the corresponding officers of the city or village, excepting that justices of the peace and constables shall continue to exercise their functions under municipal ordinances providing offices, regulating the disposition of their fees, their compensation, clerks and other officers and employes, and such justices and constables shall be elected at municipal elections. All property, moneys, credits, books, records and documents of such township shall be delivered to the council of said city or village, and all rights, interests or claims in favor of or against the township may be enforced by or against the corporation.<sup>2</sup>

(1) See old §§ 1623, 1625, 1627 R. S., repealed.

(2) **Extent of merger.**—Under the act of March 7th, 1872, which contained a provision excepting justices of the peace and constables from the operation of the merger law, similar to the one in the pres-

ent code, it was held that the act preserved the corporate existence of such township for the sole purpose of electing justices of the peace and constables, evidently to meet the constitutional requirement that justices of the peace shall be elected by townships, but that for all other



purposes the township organization in this class of cities and villages was abolished. *McGill v. State*, 34 O. S. 228, 251.

**Effect of merger.**—Under the former statutes it was held that where a township is merged into a city, the directors of a county infirmary may maintain a suit against the corporation for the costs of temporary relief furnished a pauper; and such action may be prosecuted either in the county of plaintiff or directors or in that in which the city is situated. *Directors, etc., v. Toledo*, 15 O. S. 409.

It was also held under the former statutes that where the cor-

porate limits of a city or village became identical with those of a township and the office of township clerk was thereby abolished the office of the clerk of such city or village became a depository for chattel mortgages. *Curtiss v. McDougal*, 26 O. S. 66.

**Municipality is part of township.**—Where the boundaries of a city are not coterminus with those of a township the territory within such city does not cease to be part of the township or townships within the limits of which it is situated, for election purposes. *State v. Ward*, 17 O. S. 543.

**Sec. 4. [Surrender of corporate powers: judicial notice of classification.]**<sup>1</sup> Villages may surrender their corporate powers upon petition to council of at least forty per cent.<sup>2</sup> of the electors thereof, to be determined by the number voting at the last municipal election, and an affirmative vote of a majority of said electors at a special election which shall be provided for by council, and conducted and canvassed, and the result certified and made known as regular municipal elections within the corporation. If the result of the election is in favor of such surrender, the clerk of the village shall certify the same to the secretary of state and the recorder of the county, who shall record the same in their respective offices, and thereupon the corporate powers of such village shall cease; provided that such surrender of corporate powers shall not affect vested rights or accrued liabilities of such village,<sup>3</sup> or the power to settle claims, dispose of property, or levy and collect taxes<sup>4</sup> to pay existing obligations; but after the presentation of the petition herein referred to, council shall not create any new liability until the result of the election is declared, nor thereafter, if such result is in favor of the surrender of corporate powers;

provided, further, that due and unpaid taxes may thereafter be collected, and all moneys or property remaining after such surrender shall belong to the school district embracing such village.

All courts shall take judicial notice of the classification of municipal corporations, and their advancement, reduction and surrender of powers.<sup>5</sup>

(1) **Old Sections.**—See sections 1633-1647 R. S. inclusive, repealed. The sections (1633-1642 R. S.) allowing cities to surrender corporate powers and be reduced to villages, are repealed, without any corresponding provisions being made in the new code. It is no longer optional with a municipality to be a city or village. Municipalities over 5,000 population at the last federal census, are necessarily cities, unless changed by the next federal census.

(2) **Number of Petitioners.**—Under sections 1633 to 1647 R. S. of the former law on this subject, it was held that in a mandamus in the Court of Common Pleas to compel the council of a village to order an election on the question of surrender of corporate powers, the issue of whether the requisite number had signed the petition was not one of right triable by a jury, and that either party might appeal from the judgment of the Court of Common Pleas thereon. *Dutton v. Village of Hanover*, 42 O. S. 215.

It was held to be the duty of council before taking action upon such a petition to satisfy itself that

the petition contained the requisite number of qualified petitioners, and for this purpose, council might refer the petition to a committee to make examination. *Ib.*

Signers of such a petition might withdraw their names at any time before final action thereon by council, and if the number of names is reduced below the requisite amount, council must refuse to order an election. *Ib.*

(3) See notes to section 211 of the Code.

(4) Under former sections it was held that officers of a municipality, after its corporate rights had been extinguished, cannot by resignation avoid the duty of levying and collecting the taxes to pay its debts. *Gorgas v. Blackburn*, 14 O. 252.

(5) Under the classification of cities which had obtained before the enactment of the new code, Courts were not bound to take judicial notice of the grades and classes of municipal corporations. *Bolton v. Cleveland*, 35 O. S. 319; *Massa v. The State*, 3 C. C. 9; but see *State v. Constantine*, 42 O. S. 437.

#### FORM OF PETITION TO COUNCIL FOR SURRENDER OF CORPORATE POWERS.

To the Council of the Village of....., State of Ohio:

The undersigned, being forty per cent. of the electors of the village of....., respectfully represent that it is their desire that the corporate

powers of said village be surrendered, and that the said village become a part of the township organization within the territorial limits of which it is situated, and they therefore pray you to cause an election to be held in said village in the manner provided by law to determine the sense of the electors thereof upon that subject.

(This petition must be signed by 40 per cent. of the electors of the village.)

#### FORM OF ORDINANCE ORDERING ELECTION.

Ordinance No.....

Ordering election on question of surrendering corporate powers.

Be it ordained by the council of the village of....., State of Ohio:

Sec. (1) That upon the.....day of....., 190.., there be held a special election in the village of....., State of Ohio, at..... (here insert place of holding election) by the qualified voters of said village to vote upon the question of surrendering the corporate powers of said village and of reducing said village to be a part of the township organization within the territorial limits of which it is situated.

Sec. (2). The ballots cast at such election shall contain the words, "For Surrender" or "Against Surrender" and such election shall be held and conducted as regular municipal elections within the corporation.

Sec. (3) This ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed this.....day of....., 19....

Attest:

.....  
President of Council.

.....  
Clerk.

#### FORM OF CLERK'S CERTIFICATE.

To the Honorable, the Secretary of State of the State of Ohio, [or Recorder of the county of.....]:

This is to certify that at a special election duly provided by the council and held in the village of....., State of Ohio, on the.....day of ....., 19..., a majority of the electors of said village voted in favor of the surrender of the corporate powers of said village.

Given under my hand and official seal, this.....day of ....., 19....,

.....  
Clerk.

## 2. CREATION AND INCORPORATION OF VILLAGES.

**Sec. 5.** [Statutes re-enacted.] Villages may be created and incorporated in the manner now provided in title XII, division 2, chapter 2 of the Revised Statutes of Ohio.<sup>1</sup>

(1) Title XII., Div. 2, Chap. 2,

R. S., contains sections 1553-1571a inclusive.



**Sec. 1553 R. S. [Right to incorporation; restrictions.]** The inhabitants of any territory laid off into village or hamlet lots, a plat of which territory has been acknowledged and recorded as is provided with respect to deeds, or the inhabitants of any territory which has been laid off into such lots and surveyed and platted by an engineer or surveyor who certifies thereon, under oath, to its correctness, and which is recorded as is provided with respect to deeds, or the inhabitants of any island or adjacent islands, or parts thereof, or of such island or islands or parts thereof, and adjacent territory, may obtain the organization of a village or hamlet,<sup>1</sup> in the manner provided in this title; and when such village or hamlet is organized upon any island or islands, it may be done without reference to the number of permanent inhabitants embraced within such territory, and without such plat having been first made; provided, that no corporation under this chapter shall embrace within its limits the grounds or improvements of any county or city infirmary.<sup>2</sup> [92 v. 26; 73 v. 165, § 9; 76 v. 116, § 1.]

(1) See note, "Status of Hamlets," under § 1 of the Code.

(2) **Suit to test right.**—Whether a suit in quo warranto will lie to test the right of the people of a certain locality to be a municipal corporation, *quere*. State ex rel. v. Newark, 57 O. S. 430.

**Construction of these provisions.**—The provisions of Title XII, Div. 2, Chap. 2, are to be construed in connection with Title XII, Div. 2, Chap. 5, and both are to be construed as one act. *Shugars v. Williams*, 50 O. S. 297.

**Sec. 1554 R. S. [How application made.]** Application for such purpose shall be made by petition, which, except as provided in the last preceding section, shall be signed by not less than thirty electors, residing within the proposed corporate limits, and addressed to the county commissioners; and the same shall be accompanied by an accurate map of the territory.<sup>1</sup> [71 v. 65, § 10; 66 v. 150, § 11.]

(1) **Title of Petition.**—A paper filed as a petition and treated as such, although styled "Amended Petition" is a sufficient compliance with the statute. The character and

contents of the paper should be looked at, to ascertain what it is, and not merely its title. *Turpin v. Hagerty*, 12 Dec. 161, (aff'd 69 O. S. 534).

**Sec. 1555 R. S. [Petition: what it shall contain.]** The petitions shall contain the matters following: 1. An accurate description<sup>1</sup> of the territory embraced within the proposed corporation, and it may contain adjacent territory not laid off into



lots; 2. The supposed number of inhabitants residing in the proposed corporation; 3. Whether the corporation desired is a village or hamlet;<sup>2</sup> 4. The name proposed; and 5. The name of some person to act as agent for the petitioners, and more than one agent may be named therein. [66 v. 150, § 11.]

(1) **Plat from Public Records.**  
—A map and description taken from the public records as they had stood for years, is sufficient to comply with the requirement of an accurate description, even though ac-

tual measurements reveal some discrepancies in the map. *Turpin v. Hagerty*, 12 Dec. 161 (aff'd 69 O. S. 534). See also *Wright v. Oberlin*, 23 C. C., 509.

(2) See note "Status of Hamlets" under § 1 of the Code.

### FORM OF PETITION FOR INCORPORATION OF VILLAGES.

To the Board of Commissioners of the County of.....,  
State of Ohio:

The undersigned, being thirty [or more] electors residing within the following described territory, situated in..... County, State of Ohio, to-wit:

(Here give an accurate description of territory embraced within the proposed corporation); an accurate map of which territory is attached hereto; respectfully represent

That all [or a part] of said territory has been laid off into village lots, a plat of which territory so laid off, has been acknowledged and recorded as is provided with respect to deeds [or which territory has been surveyed and platted by an engineer who has certified thereon, under oath that the same is correct];

That the territory above described does not embrace within its limits the grounds or improvements of any county or city infirmary;

That the number of inhabitants now residing in said territory is about .....

. And respectfully petition your honorable body that said territory may be organized into a village, in the manner provided by law, to be named the "Village of ....."; and ..... and ..... are hereby designated as agents for the undersigned to act for them in all matters before your honorable body relative to this petition and to the organization of the said territory into the said village.

(This must be signed by at least 30 electors residing in the territory to be organized into a village.)

A map of the territory described marked "Map of territory to be organized into the village of.....," should be attached to the petition.

The form given may be adapted to a petition for the incorporation of territory on an island or islands. In such case no map need accompany the petition, and the reference to the number of inhabitants may be omitted.

**Sec. 1556 R. S. [Presentation to commissioners: time of hearing; notice.]** The petition shall be presented to the board of commissioners at a regular session thereof, and when so presented the board shall cause it to be filed in the office of the county auditor,<sup>1</sup> where it shall be subject to the inspection of any person interested; and the commissioners shall then fix the time and place for hearing the petition, and communicate the same to the agent of the petitioners, which time shall not be less than sixty days after such filing; and thereupon the agent shall cause a notice containing the substance of the petition, and the time and place where the same will be heard, to be published in some newspaper printed and of general circulation in the county, for the period of six consecutive weeks, and cause a copy of the notice to be posted in a conspicuous place within the limits of the proposed corporation, not less than six weeks prior to the time fixed for such hearing.<sup>2</sup> [66 v. 150, § 12.]

**(1) Filing with county auditor.**—Purpose of provision requiring petition to be filed in office of county auditor was to provide a safe place for deposit and not as additional notice of the hearing, and a failure so to file the petition, does not deprive the board of jurisdiction to proceed. *Pollock v. Toland*, 25 C. C. 75; 1 C. C. (N. S.) 315.

**(2) Posting of notice.**—The notice here required when made applicable to the annexation of terri-

tory to a village on its application, must be posted on the territory to be annexed. *Franklin v. Croll*, 31 O. S. 647. See § 1590 R. S.

**Adjourned meetings of commissioners.**—Adjourned meetings of the county commissioners are continuations of the regular sessions, in so far as the requirements of this section are concerned. *Turpin v. Hagerty*, 12 Dec. 161, (aff'd 69 O. S. 534).

## FORM OF NOTICE OF PETITION.

### LEGAL NOTICE.

Notice is hereby given that on.....19 .., there was presented to the Board of Commissioners of the County of ....., State of Ohio, a petition signed by thirty [or more] electors residing within the following described territory in the County of ....., State of Ohio, to-wit:

(Here copy description of territory given in the petition), and representing that (here copy the representations in the petition); and praying therein that said territory may be organized into a village to be named the "Village of.....," which petition is now on file in the office of the auditor of.....County; and designating the undersigned to act as the agents of the petitioners, as required by law.

The said Board of Commissioners has fixed.....19 .., at.... o'clock....M., as the time for hearing said petition (not less than sixty days after petition is filed) at the office of the commissioners in..... (here insert place).

(To be signed by the designated agent or agents.)

This notice should be published in some paper printed and of general circulation in the county, or if none such, then in some paper of general circulation in the county (see § 1537 R. S.) for six consecutive weeks prior to the time set for hearing, and should also be posted for the same

length of time at some conspicuous place within the limits of the proposed corporation.

**Sec. 1557 R. S. [Hearing before the commissioners.]** The hearing shall be public, and may be adjourned from time to time, and from place to place, according to the discretion of the commissioners, and any person interested may appear, in person or by attorney, and contest the granting of the prayer of the petition, and any affidavits presented in support of or against the prayer of the petition shall be considered by the commissioners, and the petition may be amended by their leave; but if any amendment is permitted, whereby territory not before embraced is added, the commissioners shall appoint another time for the hearing, of which notice shall be given, as specified in the last preceding section.<sup>1</sup> [66 v. 151, § 13.]

**(1) Applies to annexation proceedings.**—This section applies to the procedure in case of annexation of territory to a village (§§ 1589–1615 R. S.) as well as to the case of organization of a village. *Shugars v. Williams*, 50 O. S. 297.

**Amendment to cure error in description** which merely corrects omission of one course in boundary may be made without additional notice. *Pollock v. Toland*, 1 C. C. (N. S.) 315; 25 C. C. 75.

**Sec. 1558 R. S. [Order for organization.]** If the commissioners, upon such hearing, find that the petition contains all the matters required, that its statements are true, that the name proposed is appropriate, that the limits of the proposed corporation are accurately described, and are not unreasonably large or small, that the map or plat is accurate, that the persons whose names are subscribed to the petition are electors residing on the territory, that notice has been given as required, that there is the requisite population for the proposed corporation, and if, moreover, it seems to the commissioners right that the prayer of the petition be granted, they shall cause an order to be entered on their journal to the effect that the corporation may be organized. [66 v. 151, § 14.]

#### FORM OF ORDER OF ORGANIZATION.

The Board of Commissioners of the County of ..... proceeding this day to hear the matter of the petition of ..... and others to obtain the organization of the territory in their petition described, into a village, in accordance with law, and having in open meeting, heard all persons desiring to be heard for or against the granting of said petition, and considered the affidavits presented with reference thereto, and being fully advised, find that said petition contains all the matter required by law; that its statements are true; that the name of said proposed village, which is given in the petition, is appropriate; that the limits of the pro-



posed corporation are accurately described and are not unreasonably large or small; that the map of the same, filed with the petition, is accurate; that a sufficient number as required by law of the persons whose names are subscribed to the petition, are electors residing within the territory described in the petition; that the required legal notice of the petition has been given, and that the population of said proposed corporation is ....., which is a sufficient number;

And it further appearing to the Board that it is right and proper that said petition should be granted, it is hereby ordered that the prayer of said petition be granted, and that the territory described in said petition may be organized into a village to be known as the "Village of.....," as prayed for in the petition, and that a certified transcript signed by a majority of this board of all the orders and proceedings of this board relative to said petition and hearing thereon, together with said petition, and map attached thereto, and all papers on file relating to said matter, be transmitted at once to the recorder of the county.

(If the petition is rejected the form may be adapted to suit this contingency.)

**Sec. 1559 R. S. [Order to be entered on journal; papers filed with recorder.]** The commissioners shall cause to be entered on their journal all their orders and proceedings in relation to such incorporation, and they shall cause a certified transcript thereof, signed by a majority of them, to be delivered, together with the petition, map, and all other papers on file, relating to the matter, to the recorder of the county, at the earliest time practicable. [66 v. 151, § 15; 66 v. 152, § 19.]

**Sec. 1560 R. S. [When recorder to make record.]** The recorder shall file the transcript and other papers in his office, and at the expiration of sixty days thereafter, unless enjoined as hereinafter provided, he shall make a record of the petition, transcript, and map in the proper book of records, and preserve in his office the original papers delivered to him by the commissioners, certifying thereon that the transcript, petition, and map are properly recorded. [66 v. 151, § 16.]

**Sec. 1561 R. S. [Name; transcript of record; judicial notice taken of corporation.]** When the record is made, the corporation shall be deemed the village of—, or the hamlet<sup>1</sup> of—, as the case may be, to be organized and governed under the provisions of this title; and thereupon the recorder shall make, and certify under his official seal, two transcripts of the record, one of which he shall forward to the secretary of state, and the other deliver, on demand, to the agent of the petitioners, with a certificate thereon that the duplicate has been forwarded to



the secretary of state; and when any municipal corporation is organized by the election of its officers, notice of its existence shall be taken in all judicial proceedings. [66 v. 152, §§ 17, 18.]

(1) See note, "Status of Hamlets," under § 1 of the code.

**Sec. 1561a R. S. [Petition to township trustees for incorporation.]** When the inhabitants of any territory or portion thereof desire that such territory shall be incorporated into a village or hamlet<sup>1</sup> they shall make application to the trustees<sup>2</sup> of the township [in which] the territory is located, or if the territory is located in more than one township, to the trustees of the township in which the majority of the said inhabitants reside, by petition, signed by at least 30 electors thereof, a majority of whom shall be freeholders. Said petition shall be accompanied by an accurate map<sup>3</sup> of the territory, and shall contain in addition to the matter set forth in § 1555 of the Revised Statutes of Ohio, the request of the petitioners that an election be held to obtain the sense of the electors upon such incorporation and such petition may be presented at a regular or special meeting of the township trustees. [94 v. 18; 92 v. 333.]

(1) See note, "Status of Hamlets," under § 1 of the code.

(2) **Filing petition.**—The clerk of the township is the clerk of its board of trustees and the petition and map are sufficiently filed and presented to the township trustees, if filed with the township clerk. State ex rel. v. Mitchell, 22 C. C. 208.

The fact that the petition and map were, after being filed, returned to the person filing as a matter of convenience in carrying it to the board meeting, would not invalidate the filing. *Ib.*

**Time to consider petition,** must be allowed trustees, and mandamus, before a week has elapsed, will not lie to compel action. State ex rel. v. Trustees, 19 C. C. 742.

**Rival petitions.**—Where two legal petitions are filed the trustees

must act on the one filed first, and no further action can be taken until that petition is disposed of; and mandamus will lie in such case to compel the trustees to act on the first petition. State ex rel. v. Mitchell, 22 C. C. 208.

**Purpose of the section.**—The purpose of the statute was to allow a part of a township to be formed into a municipal corporation, and it is against public policy to form the entire township into such corporation in order to defeat this purpose. State ex rel. v. Mitchell, 22 C. C. 208.

(3) **Defective map.**—If the map filed is not accurate it may be supplemented by a more perfect one, before action is taken by the trustees. State ex rel. v. Mitchell, 22 C. C. 208.

#### FORM OF PETITION TO TOWNSHIP TRUSTEES FOR INCORPORATION OF VILLAGE.

To the Trustees of the Township of....., State of Ohio:

The undersigned, being thirty [*or more*] electors, a majority of whom are freeholders and all of whom reside within the following described terri-

tory situated within the County of....., State of Ohio, to-wit:

(Here insert accurate description of territory embraced within the proposed corporation); an accurate map of which territory is attached hereto, respectfully represent that the number of inhabitants residing within said territory is.....and respectfully petition your honorable body that said territory may be organized into a village in the manner provided by law, and that the name of said village may be the "Village of.....," and hereby designate..... and ..... their agents to act for them in all matters relating to the hearing upon this petition and in other matters relating to the incorporation of said territory into a village; and further petition your honorable body that an election may be ordered to obtain the sense of the electors of said territory upon the question of its incorporation into a village as prayed for in this petition.

(This petition must be signed by at least thirty electors residing in the territory to be organized into a village, a majority of whom must be freeholders.)

(A map of the territory described, marked "Map of territory to be organized in the village of.....," should be attached to the petition.)

**Sec. 1561b R. S. [Procedure upon receipt of petition.]** When the township trustees receive the petition, together with the proof that the persons who signed it are electors, and reside within the limits of the proposed incorporation, and that a majority of them are freeholders, they shall then make and declare that such territory shall, with the assent of the qualified voters thereof as hereinafter provided, be an incorporated village or hamlet<sup>1</sup> by the name specified in the petition aforesaid, and they shall also include in such order, a notice for the election by the qualified voters, residents in said territory, at a convenient place therein to be by them named, on some day within fifteen days thereafter, to determine whether such territory shall be incorporated, and said township trustees shall give ten days' notice of such election by publication in a newspaper of general circulation in such territory, and cause written or printed notices thereof, to be posted in three or more public places in said territory proposed to be incorporated. [92 v. 333.]

(1) See note, "Status of Hamlets," under § 1 of the code.

#### FORM OF FINDING AND ORDER OF TRUSTEES.

WHEREAS, A petition has been presented to the trustees of the township of....., County of....., signed by.....and others, praying that the following described territory: (Here copy description of

territory given in the petition), may be incorporated into a village as provided by law; and

WHEREAS, Said trustees after hearing all evidence submitted are fully satisfied that the persons who signed the said petition are electors residing within the territory proposed to be incorporated into a village and that a majority of them are freeholders therein;

Now therefore be it Resolved, That the said territory be, and the same is hereby made and declared to be an incorporated village by the name of the "Village of.....," with the assent of the qualified voters thereof.

Sec. 2. That an election be held on the.....day of.....19 .. (this date must be within fifteen days after the date of the resolution), to obtain the sense of the electors of said territory on the question of incorporation of said territory into the village of.....and that such election be held at (here insert place of holding election).

Sec. 3. That notice of the time and place of holding such election be given by publication in....., a newspaper of general circulation in said territory and by posting written [or printed] notices thereof in three or more public places in said territory proposed to be incorporated. (The notice must be for a period of ten days.)

Passed this.....day of.....19 ... (To be signed by the Trustees of the Township. Attested by Clerk.)

#### FORM OF NOTICE OF ELECTION.

##### LEGAL NOTICE.

Notice is hereby given that on the.....day of.....at..... (here insert place of holding election), in the township of....., County of....., an election will be held to determine whether the following described territory shall be incorporated into a village to be known as the "Village of.....," to-wit: (Here copy description of territory given in the petition.)

By order of the trustees of the township of..... (to be signed by the trustees of the township, and attested by the clerk).

**Sec. 1561c R. S. [Election upon question; injunction; petition for error.]** The township trustees shall be judges of the election, and the township clerk shall be clerk thereof, and the election shall, as far as practicable, be conducted in the manner prescribed for the election of township officers, and the ballot shall contain the words "For incorporation" and "Against incorporation," and if a majority of the ballots cast at such election shall contain thereon the words "Against incorporation," the voters of such territory shall be deemed not to have assented to the incorporation thereof, and no further proceedings shall be had in relation thereto, but this shall not be a bar to other proceedings for the same purpose; but if a majority of



the ballots cast shall have thereon the words "For incorporation," the township trustees shall cause to be entered on their journal, a minute of all their proceedings, the number of votes cast at the election, the number of votes cast for incorporation, and the number cast against incorporation, and they shall then declare that said territory shall from that time be deemed an incorporated village or hamlet,<sup>1</sup> and shall make an order declaring that such village or hamlet has been incorporated by the name adopted, and the trustees shall make a certified transcript of the journal entries of all their proceedings, together with their original petition and plat, and a majority of them having signed it, they shall deliver the same to the county recorder, who shall forthwith make a record of the petition, transcript and plat or map, in the public book of records, and preserve in his office the original papers delivered to him by the trustees, and certify thereon that the transcribed petition and map are properly recorded. When the recorder has so made said record, he shall certify and forward to the secretary of state, a transcript of the same. The corporation shall then be a village or hamlet, as the case may be, under the name adopted in the petition, with all powers and authorities, and be recognized as such, the same as if such incorporation had been organized under chapter 2, division 2, title 12 of the Revised Statutes of Ohio, but no injunction shall be brought, as provided in § 1562 of the Revised Statutes of Ohio, unless the same be instituted within ten days from the filing of the papers with the county recorder; provided, however, that the right of petition to the court of common pleas for error, shall exist as is provided for in the following sections of this chapter.<sup>2</sup> [92 v. 334.]

(1) See note, "Status of hamlets," under § 1 of the code.

(2) **Injunction against election.**—In view of the statutory remedies provided in § 1561 c. R. S., by which the right to petition the Court of Common Pleas for review of proceedings had for incorporation is given, an injunction to restrain the election by the voters of the territory to be incorpo-

ated ordered by the township trustees can not be granted. *Lawrence v. Mitchell*, 8 N. P. 8. See *State v. Mitchell*, 22 C. C. 208.

**Constitutionality.**— §§ 1561a, 1561b, 1561c, R. S., authorizing incorporations under proceedings before township trustees is not unconstitutional as a delegation of power by the Legislature. *Ib.*

#### FORM OF DECLARATION AND ORDER OF TRUSTEES.

**WHEREAS**, An election was held in the township of....., County of....., State of Ohio, on the.....day of.....190.., to de-



termine whether the following described territory shall be incorporated into a village to be known as the "Village of.....," to-wit: (Here copy description of territory given in the petition and election notice); and

WHEREAS, At said election.....votes were cast, .....of which were in favor of said incorporation and.....of which were against the same, a majority being in favor of said incorporation,

Now therefore, it is hereby ordered and declared that said territory shall henceforth be deemed an incorporated village, and

It is further ordered and declared that such village has been incorporated by the name of the "Village of.....," and a certified transcript of the journal entries of all the proceedings of this board in this matter, together with the original petition and plat, shall be delivered to the Recorder of the County of.....

(This should be signed by the trustees and attested by the clerk.)

**Sec. 1562 R. S. [Injunction against recorder.]** Any person interested may, within sixty days from the filing of the papers with the recorder, as above provided, make application by petition to the court of common pleas, or, if during vacation, to a judge thereof, setting forth the errors complained of, or the inaccuracy of the boundaries, or that the limits of the proposed corporation are unreasonably large or small, or that it is not right, just, or equitable that the prayer of the petition presented to the board of commissioners be granted, or containing any or all of such averments, and praying an injunction restraining the recorder from making the record and certifying the transcript, as above required.<sup>1</sup> [92 v. 196; 66 v. 152, § 20.]

(1) **Scope of injunction.**—In an injunction under this section, the case made before the commissioners cannot be retried upon its merit, and an injunction cannot be allowed except for errors or irregularity in the proceedings or any inaccuracy in the description of territory sought to be incorporated. *Hulbert v. Mason*, 29 O. S. 562.

**No appeal.**—No appeal lies from the judgment of the court or judge, allowing or refusing the injunction. The application to the court is not in the nature of a bill in equity or of a civil action, but of a proceeding in error. *Hulbert v. Mason*, 29 O. S. 562.

**Contents of petition.**—Petition should set forth specifically the er-

rors complained of, and should not state merely that errors were committed. *Hulbert v. Mason*, 29 O. S. 562.

**Interest Required.**—It is not necessary that plaintiff should have a direct, pecuniary interest in property within the proposed corporation to constitute a "person interested," and one residing and owning property two miles distant therefrom whose taxes will be increased, has such an interest. *Hall v. Siegrist*, 13 Dec., 46.

**Collateral attack.**—The order of the county commissioners though subject to review by the courts, is not void, and cannot be collaterally impeached. *Blanchard v. Bissell*, 11 O. S. 96.

## FORM OF PETITION FOR INJUNCTION.

Court of Common Pleas,.....County, Ohio.

|                                   |             |
|-----------------------------------|-------------|
| .....                             | } PETITION. |
| Plaintiff,                        |             |
| vs.                               |             |
| Recorder of the County<br>of..... |             |
| Defendant.                        |             |

Plaintiff says that certain territory within the County of.....  
[or the township of....., in the County of.....], is sought  
to be organized into an incorporated village under the name of the "Village  
of.....";

A certified transcript of the proceedings of the County Commissioners  
[or of the township trustees] in relation thereto, together with the petition  
for such incorporation, and all maps and papers relating thereto are now  
in the hands of the Recorder of this County for record.

Plaintiff further says that he is a resident of the territory sought to be  
incorporated as aforesaid, and is interested in the matter of such incor-  
poration.

And plaintiff further says that there is error in the said proceedings in  
this, to-wit: (Here state specifically the errors complained of.)

Wherefore, plaintiff prays that an injunction may issue restraining the  
recorder from making a record of the said proceedings and certifying the  
transcript thereof as provided by law.

[Verification.]

.....  
Attorney for Plaintiff.

(If suit is brought to prevent incorporation upon petition to County  
Commissioners the same must be filed within sixty days from the filing of  
the papers with the recorder, § 1562 R. S.; if to prevent incorporation upon  
petition to township trustees, it must be filed within ten days from the  
filing of the papers with the recorder, § 1561c, R. S.)

**Sec. 1563 R. S. [Proceedings in such case.]** When the pe-  
tition is filed, the person filing the same shall give notice there-  
of, in writing, to the recorder and the agent of the petitioners  
for the corporation; and the recorder, on receiving such notice,  
shall forthwith transmit to the clerk of the court where the  
petition for injunction is pending, all the papers relating to  
the matter on file in the recorder's office; and in that event, no  
record of the papers shall be made by the recorder, or transcript  
certified by him, as above provided, unless he receive a certifi-  
cate from the clerk of the court, showing that the injunction  
has been denied. [66 v. 152, §§ 21, 22.]

## FORM OF NOTICES OF PETITION.

To the Recorder of the County of.....:

You are hereby notified that a petition has been filed by the undersigned,  
on the .....day of.....190., in the Court of Common Pleas, in the  
County of ....., State of Ohio, praying therein for an injunction  
restraining you from making a record of the proceedings for the incorpora-  
tion of the village of.....or certifying transcripts of such record.  
....., Plaintiff.

To.....and....., agents of the petitioners for the incorporation of the village of.....:

You are hereby notified that a petition has been filed by the undersigned on the .....day of.....190....., in the Court of Common Pleas, of the County of....., State of Ohio, praying therein for an injunction restraining the Recorder of.....County from making a record of the proceedings for the incorporation of the village of..... or certifying transcripts of such record.

....., Plaintiff.

**Sec. 1564 R. S. [Filing, docketing and hearing of petition, and judgment thereon.]** The court or judge shall cause said petition to be filed and docketed in the office of the clerk of courts, and shall hear the petition at such time as he shall appoint, not less than twenty days from the filing of the same. And upon such hearing the court or judge may hear evidence upon the matters and things averred in the petition; and if, upon such hearing, no error is found in the proceedings before the commissioners, and no inaccuracy in the boundaries, and if the court shall further find that the limits of the proposed corporation are not unreasonably large or small, and that it is right, just and equitable that the prayer of the petition presented to the commissioners be granted, the petition for such injunction shall be dismissed; and thereupon the clerk shall return the papers to the recorder, with a certified transcript of the order of the court, and the recorder shall immediately record the transcript certified by the commissioners, the petition for the corporation, the map, and the order of the court, and make, forward and deliver transcripts as above provided; but if error is found in the proceedings, or if the boundaries are found to be so inaccurately described as to render indefinite or uncertain limits or extent of the proposed corporation, or if the court shall find that the limits of the proposed corporation are unreasonably large or small, or that it is not right, just or equitable that the prayer of the petition presented to the commissioners be granted, then the court or judge shall make an order enjoining the recorder from making the record; provided that such order shall not be a bar to any subsequent application to the commissioners for the purpose of effecting such incorporation. And the court or judge shall render such judgment as to the payment of the cost incurred in such proceeding for injunction as he shall deem just and equitable. [92 v. 196; 66 v. 152, § 23.]

**Sec. 1565 R. S. [Election of officers.]** The first election of officers for such corporation shall be at the first annual municipal election after its creation, and the place of holding the election shall be fixed by the agent of the petitioners, and notice thereof, printed or plainly written, shall be posted by him at three or more public places within the limits of the corporation, at least ten days before the election; which election shall be conducted, and the officers chosen and qualified, in the man-



ner prescribed for the election of township officers: provided, that such first election may be a special election held at any time not exceeding six months after the incorporation, and the time and place of holding such special election shall be fixed by the agent aforesaid, and notice thereof shall be given as is required in this section for the annual municipal election. [73 v. 157, § 24.]

**Sec. 1565a R. S.** [Division and transfer of township funds when a village is created out of portion of township or townships.] When a village has been created out of a portion of a township, or portions of more than one township, under the provisions of the statutes of this state authorizing the creation of villages, a proper division of the funds for township purposes in the treasury, or in the process of collection, of the township or townships from which the territory has been taken for the creation of said village, shall, upon application of said village to the probate court of the county in which such territory is situated, be determined and ordered by said court, and the share to which said village is found entitled, ordered paid over to the treasurer of the village; and in determining the portion of said funds to which said village is entitled, the indebtedness of said township or townships shall be taken into consideration; ten days' notice of such hearing shall be given by the treasurer of the applicant to the treasurer of the townships whose funds are sought to be divided. The findings and orders of the probate court shall be final.

[§ 2.] [To what villages act to apply.] The provisions of this section shall apply only to villages created after July 1st, A. D. 1905. [1906, April 11, 98 v. 129.]

**Sec. 1566 R. S.** [When territory embraces parts of more than one county.] When the inhabitants residing upon adjacent portions of territory, in two or more counties, laid off into village or hamlet lots, a plat or plats of which which been acknowledged and recorded, as hereinbefore required, desire the organization of such territory into a village or hamlet, the petition therefor shall be made to the commissioners of the county in which the largest number of qualified voters of the proposed corporation reside, and a statement to that effect shall be set forth in the petition; and the transcript of the proceedings of the commissioners, and the map or plat accompanying the same, shall be recorded in the county in which the petition is filed, at the time and in the manner provided for in other cases; and the recorder of such county shall, within ten days thereafter, make a certified transcript of such record for each of the other counties in which any portion of the territory is situated, and forward the same to the recorders of such counties, to be by them recorded in the manner that the original papers are required to be recorded. [66 v. 153, § 25; (S. & C. 1552).]



**Sec. 1566a R. S.** [Incorporation of territory surrounding summer resort, etc.] Any territory requiring police protection and containing a population of not less than fifty persons and immediately surrounding a summer resort, park, lake or picnic ground, kept regularly for such outing and pleasure, may incorporate by setting up notices of an election in three of the most public places in the territory proposed to be included in the corporation signed by five citizens and electors of the territory. Said notices to be posted at least ten days before the election, stating time and place where such election shall be held, and shall contain an accurate description of the territory proposed to be taken into the incorporation. The election shall as far as practicable be conducted in the manner prescribed for the election of township officers. The electors present shall choose three judges and two clerks from the electors present to act as judges and clerks of said election, and the ballot shall contain the words: "For incorporation" and "Against incorporation." If the majority of the ballots cast at such election shall contain the words "For incorporation," it shall be deemed that the citizens of said designated territory have assented to such incorporation. And, if the majority of the ballots cast at such election shall contain the words "Against incorporation," it shall be deemed that the people of said designated territory shall not have assented to the incorporation thereof. Such laws governing the creation and regulation of incorporated villages in force and such as may be hereinafter enacted shall have full force and effect in so far as are not inconsistent and do not conflict with the provisions of this act. [95 v. 469.]<sup>1</sup>

(1) This section was enacted May 9, 1902, as a supplement to § 1566 R. S., and under § 212 of the code is to be regarded as expressly re-enacted.

**Sec. 1567 R. S.** [Proceedings to establish or review same as other cases.] In all other respects, the proceedings to establish the corporation, or review the action of the commissioners, shall be as provided in cases where all the inhabitants residing on the territory to be organized into such corporation, reside in one county. [66 v. 153, § 26.]

**Sec. 1568 R. S.** [Power of officers as in other cases.] When the jurisdiction of municipal officers is coextensive with the county in which the corporation is situated, their jurisdiction in corporations embracing territory of more than one county

shall be coextensive with each of the counties in which any part of such territory is located. [66 v. 153, § 27; (S. & C. 1552).]

**Sec. 1569 R. S. [Fees to be paid in advance.]** Each officer shall receive for the services required of him under this division, the same fees he would be entitled to for similar services in other cases, and, unless such fees are paid in advance, for services under this chapter, by the agent of the petitioners, of whom demand may be made, and by some person interested for services under other chapters of this division, the officer shall not be required to perform the service. [66 v. 153, § 28.]

**Sec. 1569a R. S. [Montgomery county; compensation of agent of petitioners.]** [95 v. 411.]<sup>1</sup>

(1) Though this section was enacted as a supplement to § 1569 R. S., it is expressly repealed by § 231 of the code.

**Sec. 1570 R. S. [Proceedings for change of name.]** Whenever it is desirable to change the name of a village or hamlet, a petition for the purpose, subscribed by at least twelve freeholders of the corporation, setting forth the reasons why such change is desirable, shall be filed in the court of common pleas of the county in which the corporation, or the larger part thereof, is situate; and a notice, setting forth the object of the petitioners, and the time when and place where the petition will be heard, shall be published for thirty days previous to the hearing, in a newspaper of general circulation in the corporation. [40 v. 28, §§ 2, 3; S. & C. 1138.]<sup>1</sup>

(1) See §§ 5852 to 5857 R. S., inclusive.

**Sec. 1571 R. S. [Power of court; costs; saving rights, etc.]** The court, upon being satisfied by proof that the prayer of the petitioners is just and reasonable, that notice, as required in the foregoing section, has been given, that at least three-fourths of the inhabitants of such corporation desire the change, and that there is no other municipal corporation in the state with the name as prayed for, may order such change to be made; and the clerk of the court shall thereupon tax the petitioners with the costs, and record the proceedings in a book to be kept by him for the purpose; provided, that such change shall not alter or affect any right, liability, action, or right of action, civil or criminal. [40 v. 28, §§ 1, 3, 4; S. & C. 1138.]

**Sec. 1571a R. S.** [Error in proceedings does not render void if tax has been paid.] No error, irregularity or defect in any proceeding for the creation of a municipal corporation shall render it invalid if the territory sought to be incorporated has been recognized as such corporation, and any tax levied upon it as such has been paid, or it has been subjected to the authority of the council without objection from its inhabitants. [1883, April 3: 80 v. 92.]

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### 3. ANNEXATION AND DETACHMENT OF TERRITORY.

**Sec. 6.** [Statutes Re-enacted.] Territory may be annexed to, or detached from, municipal corporations, in the manner now provided in Title XII, Division 2, Chapter 5,<sup>1</sup> of the Revised Statutes of Ohio and as also provided in an act entitled "An act to provide for detaching unplatted farm lands from cities and incorporated villages and for attaching the same to adjacent townships," passed April 23, 1902, Ohio Laws, vol. 95, page 259.

(1) Title XII, Div., 2, Chap. 5, contains §§ 1589-1616 R. S., inclusive.

#### SUBDIVISION 1. ANNEXATION OF TERRITORY ON APPLICATION OF ITS CITIZENS.

**Sec. 1589 R. S.** [Annexation of adjacent territory; petition therefor.] The inhabitants residing on any territory adjacent<sup>1</sup> to any city or village may, at their own option, cause such territory to be annexed to such city or village, in the manner hereinafter stated.<sup>2</sup> Application for such purpose shall be by petition, addressed to the commissioners of the county in which such territory is located, signed by a majority of the adult freeholders residing on such territory, and shall contain the name of some person who is authorized to act as the agent<sup>3</sup> of the petitioners in securing such annexation, and a full description of the territory, and be accompanied by an accurate map or plat thereof.<sup>4</sup> [66 v. 264, §§ 679, 680.]



(1) **Adjacent territory.**—Territory on the other side of a navigable stream would be contiguous or adjacent territory, which might be annexed. *Blanchard v. Bissell*, 11 O. S. 96.

(2) **Constitutionality.**—Annexation of territory to a municipality is not unconstitutional though private property in the annexed territory is thereby made liable for taxes to pay prior debts of the municipality and though the owner of the property so taxed might not have been qualified to vote on the question of annexation, because a non-resident. *Powers v. Wood Co.*, 8 O. S. 285; *Blanchard v. Bissell*, 11 O. S. 96.

**Consent of inhabitants** of territory to be annexed is not necessary unless required by statute and their remonstrance will not invalidate the annexation. *Blanchard v. Bissell*, 11 O. S. 96.

(3) **Agent.**—This provision held not applicable to annexation on application of a corporation. *Pollock v. Toland*, 25 C. C. 75; 1 C. C. (N. S.) 315.

(4) **Effect of annexation.**—*School district.*—A school district is not divided because a part of it is annexed to a city or village. *State v. Raine*, 4 C. C. 72 (aff'd 29 B. 108.) See *Hamlin v. State*, 22 B. 279.

*Roads.*—Public roads in the territory annexed become public highways of the city or village, without being "accepted and confirmed by ordinance." *Steubenville v. King*, 23 O. S. 610.

Part of a county road coming within a city by annexation is subject to the city's control and improvement. *R. R. Co. v. Defiance*, 10 C. C. 27; and city may assess for its improvement. *Ridenour v. Saffin*, 1 H. 464; county commissioners can not sue for obstruction of part of road brought within a city or village. *R. R. v. Comm'rs*, 35 O. S. 1; but turnpike company's rights are not extinguished without appropriation. *Tp. Co. v. Cincinnati*, 4 Rec. 325; though a toll gate cannot lawfully be maintained on territory brought into a municipality by annexation. *Turnpike Co. v. Kelley*, 41 O. S. 144.

*Justices of the Peace.*—See *Reed v. Maxfield*, 32 B. 50; *State v. Davies*, 12 C. C. 218; *Pfeiffer v. Green*, 3 N. P. 156.

*Taxation.*—When the boundaries of a municipality are extended prior to the date of the certification of the levy of municipal taxes, no special provision is necessary to authorize the levy of taxes on the annexed property, and the county auditor may be compelled by mandamus, on relation of the municipality to levy on the annexed property the municipal instead of the township tax. *State ex rel. v. Craig*, 21 C. C. 13.

**When annexation complete.**—On the passage and legal publication of the municipal ordinance, accepting the application for annexation of adjacent territory, such territory becomes a part of the municipality, although the map, transcript and other papers are not filed until a later date. *State ex rel. v. Craig* 21 C. C. 13.

#### FORM OF PETITION BY INHABITANTS FOR ANNEXATION.

To the Commissioners of.....County, State of Ohio:

The undersigned, being a majority of the adult freeholders residing on the following described territory situated in the County of..... and adjacent to the city [or village] of....., to-wit:

(Here insert accurate description of territory to be annexed.)

An accurate map of which territory is hereto attached;



Respectfully petition that the said above described territory may be annexed to the city [or village] of.....

And.....is hereby authorized to act as agent of the petitioners in securing such annexation.

(To be signed by a majority of the adult freeholders residing in the territory to be annexed.)

A map marked "Map of territory to be annexed to the city [or village] of.....," should be attached to the petition.

**Sec. 1590 R. S. [To be presented to commissioners; their duties; duties of clerk of corporation.]** Such petition shall be presented to the board of commissioners at some regular session thereof, and when so presented the same proceedings shall be had, in all respects, as far as applicable, and the same duties in respect thereto shall be performed by the commissioners and other officers, as are required in the case of an application to be organized into a village under the provisions of this division;<sup>1</sup> and the final transcript of the commissioners, and the accompanying map or plat and petition, shall be deposited with the clerk of the city or village to which such annexation is proposed to be made, who shall file the same in his office.<sup>2</sup> [66 v. 265, § 681.]

(1) **Sections referred to.**—This refers to §§ 1553-1571a R. S., inclusive, *supra*.

(2) **Construction of sections.**—All the laws (Chapters 2 and 5 of Division 2, title 12 R. S.) relating to the general subject of creation of villages and the annexation of territory to those already created are to be treated for purposes of construction as one act. *Shugars v. Williams*, 50 O. S. 297.

The course of procedure at the hearing before the county commissioners directed by § 1557 is applicable also to such proceedings in the case of annexation. *Ib*.

Provisions of § 1556 R. S. requiring deposit of petition with county auditor held not applicable to the case of proceedings for the annexation of territory on the application of a corporation. *Pollock v. Toland*, 1 C. C. (N. S.) 315; 25 C. C. 75.

**Amendment of petition.**—The authority given in § 1557 R. S. to

amend the petition applies also to a petition for the annexation of territory, and it is not necessary to the exercise of the discretion vested in the commissioners that an ordinance should previously have been passed authorizing the designated agents to apply for such amendment. *Shugars v. Williams*, 50 O. S. 297.

**Discretion of commissioners.**—The decision of the commissioners is final on the merits of the case presented to them, and injunction is allowed only for errors or irregularities in the proceedings. *Hulbert v. Mason*, 29 O. S. 562.

**Posting of Notice.**—One of the provisions relating to the organization of villages, which is incorporated by reference here, is that relating to the posting of notice of the application. In case of annexation of territory, such notice must be posted on the territory proposed to be annexed. *Franklin v. Croll*, 31 O. S. 647.

## FORM OF NOTICE OF PETITION.

## LEGAL NOTICE.

Notice is hereby given that on the.....day of.....19 .., there was presented to the Board of Commissioners of the County of....., State of Ohio, a petition signed by a majority of the adult freeholders residing in the following described territory situated in the County of .....and adjacent to the city [or village] of....., to-wit:  
(Here copy description of territory contained in petition.)

Praying therein that said territory be annexed to the city [or village] of....., in the manner provided by law and designating the undersigned as their agent in securing such annexation.

The said Board of Commissioners has fixed the.....day of....., 190.. (not less than sixty days after petition is filed), as the time for hearing said petition at the office of the Commissioners in..... (here state place of hearing).

.....  
Agent of the Petitioners.

## FORM OF ORDER OF COMMISSIONERS FOR ANNEXATION.

The Commissioners of the County of....., State of Ohio, proceeding this day to hear the petition of.....and others to obtain the annexation of the territory in their petition described to the city [or village] of....., and having in open meeting heard all the persons desiring to be heard for or against the granting of said petition and considered the affidavits presented with reference thereto, and being fully advised find that said petition contains all the matters required by law, that its statements are true; that the territory sought to be annexed is adjacent to the said city [or village] of.....; that the petition contains a full description of said territory; that the map of said territory attached to the petition is accurate; that said petition is signed by a majority of the adult freeholders residing on the territory sought to be annexed; that the required legal notice of the petition has been given, and that it is right and proper that said petition should be granted.

It is hereby ordered that the prayer of said petition be granted, and that the territory described in said petition may be annexed to the city [or village] of.....in accordance with law, and that a certified transcript signed by a majority of this Board of all the orders and proceedings of this Board relative to said petition and hearing thereon, together with said petition and map attached thereto, and all the papers on file relating to said matter be deposited at once with the clerk of the said city [or village].

**Sec. 1591 R. S. [Duties of clerk and council.]** At the next regular session of the council of such city or village, after the expiration of sixty days from the date of such filing, the clerk shall lay the transcript and the accompanying map or plat and petition before the council; and thereupon the council shall, by

resolution or ordinance, accept or reject the application for annexation. [66 v. 265, § 682.]

FORM OF ORDINANCE ACCEPTING APPLICATION FOR ANNEXATION.

Ordinance No. ....

Accepting application for annexation of territory.

Be it ordained by the council of the city [or village] of.....,  
State of Ohio:

Sec. 1. That the application of.....and others for the annexation of the following described territory in the County of..... and adjacent to the city [or village] of....., to-wit:

(Here copy description of territory contained in the petition.)

An accurate map of which territory, together with the petition for its annexation, and other papers relating thereto, and a certified transcript of the proceedings of the County Commissioners in relation thereto are on file with the clerk of the council of said city [or the clerk of said village], be and the same is hereby accepted [or rejected].

Sec. 2. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed.....19 ...

.....  
President of Council,

Attest.....

Clerk.

**Sec. 1592 R. S. [Rejection of application and its effect.]**

If the resolution or ordinance is to reject such application, no further proceedings shall be had; but such rejection shall not be a bar to any application thereafter to the county commissioners on the same subject. [66 v. 265, § 683.]

**Sec. 1593 R. S. [Proceedings when application is allowed.]**

If the resolution or ordinance is an acceptance of such application, the clerk of the city or village shall make two copies, containing the petition, map or plat accompanying the same, transcript of the proceedings of the commissioners, and resolutions and ordinances in relation to the annexation, with a certificate to each copy that the same is correct, which certificate shall be signed by him in his official capacity, and be authenticated by the seal of such city or village, if any there be, one of which copies he shall forthwith deliver to the recorder of the county, whose duty it shall be to make a record thereof in the proper book of records, and file and preserve it, and the other copy shall be forwarded by the clerk to the secretary of state. [66 v. 265, § 684.]



**Sec. 1594 R. S. [Petition to enjoin the proceedings.]** If the clerk, within sixty days from the filing of such transcript, map, or plat and petition in his office, receive notice from any person interested that he has presented to the court of common pleas, or a judge thereof, a petition to enjoin further proceedings, the clerk shall not report to the council such transcript, map, or plat and petition filed with him, until after the final hearing and disposition of the petition so presented to such court or judge.<sup>1</sup> [66 v. 265, § 685.]

(1) **Scope of injunction, etc.—** must be *presented* to court or judge.  
See notes under § 1562 R. S., p. 19. Ritter v. Falkinburg, 49 B. 277.

**How petition presented.—** Fil- For form of petition see form  
ing petition with clerk of court is under § 1562 R. S.  
not compliance with statute, but it

**Sec. 1595 R. S. [Proceedings when petition dismissed.]** If the court or judge make an order dismissing the petition, the clerk of the court shall immediately forward a certified copy of it to the clerk of the corporation, who, at the next regular meeting of the council, shall lay before the council such transcript, map, or plat, and the petition accompanying the same, as if no such petition had been so presented to the court or judge. [66 v. 265, § 686.]

**Sec. 1596 R. S. [Proceedings when injunction allowed.]** If the court or judge enjoin the clerk from making such report to the council as before provided, a certified copy of the order shall be immediately forwarded by the clerk of the court to the clerk of the corporation, who shall file the same with such transcript, map or plat, and petition, and preserve the same in his office, and thereupon no further proceedings shall be had in the matter; but such order of the court or judge shall not operate as a bar to any applications thereafter to the commissioners of the county for such purpose. [66 v. 266, § 687.]

**Sec. 1597 R. S. [Rights of inhabitants if annexation allowed.]** When the resolution or ordinance, accepting such annexation has been adopted, the territory shall be deemed a part of the city or village, and the inhabitants residing thereon shall have all the rights and privileges of the inhabitants within the original limits of such city or village. [66 v. 266, § 688.]



**Sec. 1598 R. S.** [Cases where corporation is situated in more than one county.] Where the corporation is situated in two or more counties, or the territory so to be annexed is situated in a different county from that in which the corporation or some part of it is situated, the proceedings, so far as practicable, shall be as directed in sections *fifteen hundred and sixty-six*, and *fifteen hundred and sixty-seven*.<sup>1</sup> [66 v. 266, § 689.]

(1) For forms see note to § 1562 R. S., page 20.

## SUBDIVISION 2. ANNEXATION OF TERRITORY ON APPLICATION OF A CORPORATION.

**Sec. 1599 R. S.<sup>1</sup>** [General provisions as to right.] When the inhabitants generally<sup>2</sup> of any municipal corporation desire to enlarge its corporate limits by the annexation of contiguous<sup>3</sup> territory, it shall be done in the manner hereinafter specified,<sup>4</sup> provided, however, that no proceedings shall be had to annex any village, hamlet<sup>5</sup> or territory lying contiguous and adjoining any city of the third grade of the first class,<sup>6</sup> unless the majority of all the owners of real estate residing in such village, hamlet or territory sought to be annexed shall petition therefor, and which petition shall be filed with the clerk of such city. [95 v. 113; 74 v. 36, § 690.]

(1) This section was enacted April 4, 1902, as an amendment of § 1599 R. S., and under § 212 of the code is to be regarded as expressly re-enacted.

(2) **Desire of inhabitants.**—No mode being provided for obtaining the desire of the inhabitants, generally, the act of the council expressing it, is sufficient. *Croll v. Franklin*, 40 O. S. 340.

(3) **Contiguous territory.**—Territory separated from the municipality by a navigable stream is "contiguous" territory. *Blanchard v. Bissell*, 11 O. S. 96.

(4) **Constitutionality.**—Statute is not unconstitutional because it does not provide for submission of question of annexation to a popular

vote. *State v. Cincinnati*, 52 O. S. 419.

**What territory may be annexed.**—The municipal limit may be extended over an unincorporated village. *Blanchard v. Bissell*, 11 O. S. 96.

**Effect of annexation.**—See note 3 under § 1589 R. S.

(5) See note "Status of hamlets," under § 1 of the code.

(6) **Grades and classes under new Code.**—It appears that in several instances, the Legislature, in reënacting old sections of the statutes as parts of the new Code, retains the objectionable classification of municipalities. These instances are of two kinds; first, where the old statute confers powers upon a par-

ticular grade and class of cities only, and second, where a particular grade and class is excepted from the provisions of a general law. As to the first of these cases it will generally be found that the particular statute has been upheld in a suit contesting its constitutionality on the ground of its special application, and, the municipality which was a party to the suit having acted upon the faith of the stability of the former judgment, a peculiar local subject-matter has been brought into existence, which would probably insure a reaffirmation of the validity of the special act upon the principles announced in *Taft v. Cincinnati*, 63 O. S. 141.

As to those instances in the new Code where in the reenactment of old sections, particular grades and classes of cities are retained as exceptions to the general operation of the law, it may well be contended, in view of the expressed purpose and intent of the new act, that such exceptions are abrogated and nullified, and the reenacted statute made to operate uniformly throughout the state, as effectually as if the exceptions had never existed, or had been eliminated by amendment. The new Code expressly abolishes the old classification by dividing *all* municipal corporations into cities and villages, thus leaving no municipalities upon which such exceptions can operate. It provides further (see concluding sentence of sec. 231) that "this act shall supersede all acts and *parts of acts* not herein expressly repealed, which are inconsistent herewith," and, (in sec. 229) that in the event that any section or *part of a section* shall be held to be unconstitutional, the remainder shall nevertheless be given full force and effect. These provisions sug-

gest the legislative intent to be that where parts of sections retained in the Code are inconsistent with the *new* classification of municipalities or are unconstitutional in continuing the *old* classification, such parts should be disregarded, and the remainder of the section should be given the same force and effect throughout the state as if the exceptions had been omitted. It cannot be said that the legislature would not have reenacted the old sections herein referred to without the exceptions as to particular grades and classes of cities. In fact, it appears that the legislature has expressly declared its intent to be that such exceptions are superseded and repealed as inconsistent with other provisions of the Code. As to the rule that an unconstitutional part or clause of an act may be rejected and effect given to the remainder where it appears that the one is not dependent upon the other, see *State ex rel. v. Brewster*, 39 O. S. 653, 659; *Cincinnati v. Bryson*, 15 O. 625, 645; *Bowles v. State*, 37 O. S. 35; *R. R. v. Commrs.*, 31 O. S. 338, 343; *State v. Baker*, 55 O. S. 1; *Pump v. Commissioners*, 69 O. S. 448. That an unconstitutional act may become constitutional by amendment is determined in *State ex rel. v. Cincinnati*, 52 O. S. 419, and it may also be contended that the same result would follow the repeal, where clearly intended, of an unconstitutional proviso or exception in an otherwise constitutional statute. *St. Ry. Co. v. St. Ry. Co.*, 50 O. S. 603.

On the other hand, it has been held that where an act of the Legislature required to have uniform operation throughout the state, expressly excepts from its operation one or more cities, the whole act is invalid, and the court will not hold the exception alone invalid and thus ex-

tend the act over the excepted cities, for the Legislature has not enacted it therein. State *ex rel.* v. Buckley, 60 O. S. 273. Moreover it may be said that the Legislature should not be held to have disregarded the

method prescribed by the constitution for amending statutes, even though its requirements in that respect are directory only. Const. Art. II., sec. 16; Lehman v. McBride, 15 O. S. 573.

**Sec. 1600 R. S. [Council may pass preliminary ordinance.]**

The council or board of trustees of the corporation, by a vote of not less than a majority of the members elected, shall pass an ordinance authorizing such annexation to be made, and directing the solicitor of the corporation, or some one else to be named in the ordinance, to prosecute the proceedings necessary<sup>1</sup> to effect such annexation. [74 v. 36, § 691.]

**(1) Successive applications.—**

The ordinance authorizes successive applications to the county commissioners until the agent succeeds or there is a final decision on the merits. Croll v. Franklin, 40 O. S. 340.

**The agent appointed continues**

to act though the county commissioners are reversed by the courts, until final decision on the merits. *Ib.*

**FORM OF ORDINANCE AUTHORIZING ANNEXATION.**

**Ordinance No. ....**

To authorize annexation of certain territory to the city [or village] of .....

Be it ordained by the council of the city [or village] of....., State of Ohio:

Sec. 1. That the annexation of the following described territory: (Here insert description of territory to be annexed), to the city [or village] of .....be and the same is hereby authorized.

Sec. 2. That the solicitor [or some other person named] be and he is hereby authorized to prosecute the proceedings necessary to effect such annexation.

Sec. 3. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed this.....day of....., 19 ...

.....  
President of Council.

Attest.....

Clerk.

**Sec. 1601 R. S. [Petition to county commissioners.]**

The application of the corporation to the county commissioners for such purpose shall be by petition, setting forth that, under an ordinance of the council or board of trustees, the territory therein described was authorized to be annexed to the corpo-



ration; and the petition shall contain an accurate description of such territory, and be accompanied by an accurate map or plat thereof.<sup>1</sup> [74 v. 36, § 692.]

(1) **Agent.**—Where a petition is presented on behalf of a city and consented to by the corporation counsel, it is not necessary that such petition contain name of person au-

thorized to act as agent of the petitioners. Section 1589 does not apply to annexation on application of a corporation. *Pollock v. Toland*, 1 C. C. (N. S.) 315; 25 C. C. 75.

#### FORM OF PETITION BY THE CORPORATION FOR ANNEXATION OF TERRITORY.

To the Commissioners of.....County, State of Ohio:

The city [or village] of.....respectfully represents that by an ordinance duly passed by its council on the....day of....., 190., the following described territory (here copy description of territory contained in the ordinance) was authorized to be annexed to said city [or village].

An accurate map of which territory is hereto attached.

And said city [or village] respectfully petitions that said territory may be annexed to said city [or village].

City [or village] of.....  
by.....  
City [or village] Solicitor.

**Sec. 1602 R. S.** [Proceedings before commissioners.] When such petition is presented to the commissioners, like proceedings shall be had, in all respects, so far as applicable, as are required under the provisions of subdivision one of this chapter.<sup>1</sup> [66 v. 266, § 693.]

(1) **Sections referred to.**—This refers to §§ 1589–1616 R. S. inclusive. And see notes giving sections

referred to, under § 1590 R. S. See generally, notes under § 1590 R. S.

**Agent.**—See note to § 1601 R. S. *supra*.

**Sec. 1603 R. S.** [Cases where corporation in more than one county.] Where the corporation is situated in two or more counties, or the territory to be annexed is situated in a different county from that in which the corporation or some part of it is situated, the proceedings shall be in the county in which the territory to be annexed, or some part of it, is situate. [66 v. 267, § 694.]

**Sec. 1603a R. S.** [When such territory lies partly in another county or counties.] Where the territory sought to be annexed is partly in the county in which the corporation is situated and partly in another county, or counties, the proceedings shall be in that county in which there is the largest number of qualified voters residing upon the territory sought to be annexed, and, so far as practicable, such proceedings shall be as directed in sections *fifteen hundred and sixty-six* and *fifteen hundred and sixty-seven*. [1888, April 13: 85 v. 224.]



**Sec. 1604 R. S. [Rights when annexation complete.]** When the annexation of such described territory has been completed, the same shall be deemed a part of such municipal corporation, and the inhabitants residing on the territory shall have all the rights and privileges of the inhabitants residing within the original limits of the corporation.<sup>1</sup> [66 v. 267, § 695.]

(1) **Effect of annexation.**—See note 3 under § 1589 R. S.

**Taxes** may be levied on the annexed territory to pay pre-existing debts of the municipality. *Powers v. Wood Co.*, 8 O. S. 285.

**Consent of inhabitants.**—The fact that the inhabitants of the annexed territory did not consent to the annexation and that it was done against their remonstrance, does not invalidate the annexation. *Blanchard v. Bissell*, 11 O. S. 96.

**Sec. 1605 R. S. [When errors not fatal to proceedings.]** No error, irregularity, or defect in such proceedings shall render it invalid, if the addition has been recognized as a part of the corporation, and taxes levied upon it as such have been paid, and it has been subjected to the authority of the council, without objection from its inhabitants. [66 v. 267, § 696.]

### SUBDIVISION 3. ANNEXATION OF ONE MUNICIPAL CORPORATION TO ANOTHER.

**Sec. 1606 R. S. [Annexation of contiguous territory to corporations.]** When the inhabitants, generally, of any municipal corporation, the territory of which shall be contiguous, and adjoining the territory of another municipal corporation, desire to be annexed to such other corporation, such annexation shall be effected in the manner hereinafter described.<sup>1</sup> [66 v. 267, § 697.]

(1) See notes under § 1599 R. S. *supra*.

**Sec. 1607 R. S. [Submission of question to vote.]** The trustees or council of the corporation proposing such annexation shall submit the question of annexation to the electors of the corporation, and the trustees or council of the corporation to which the annexation is proposed to be made, shall also submit the same question to its electors. [66 v. 267, § 698.]

**Sec. 1608 R. S. [Ordinance for purpose.]** The submission shall be by ordinances adopted by the trustees or council of each

corporation at least thirty days prior to an annual election, at which election the vote shall be taken, and the ordinances shall each prescribe the manner in which such submission shall be made, and they shall be published in each corporation, by posters or otherwise, in such manner as the respective trustees or councils may deem most expedient, for the period of at least twenty days prior to the day fixed for such election. [1904, April 25, 97 v. 190; 66 v. 267, § 699.]

FORM OF ORDINANCE SUBMITTING TO VOTE THE QUESTION OF  
ANNEXATION TO ANOTHER MUNICIPALITY.

Ordinance No. ....

To submit to vote the question of annexation of the city [or village] of  
.....to the city [or village] of.....

Be it ordained by the council of the city [or village] of.....:

Sec. 1. That the question of the annexation of the city [or village] of  
.....to this city [or village] of.....be submitted to the  
qualified voters of the city [or village] of.....at the annual elec-  
tion in.....19.....

Sec. 2. The question whether such annexation shall be made shall be  
put in the form of "Shall the city [or village] of..... be annexed  
to the city [or village] of.....," "Yes," "No," and printed on  
ballots, and those who are in favor of such annexation shall place a cross  
mark after the word "Yes," and those who are opposed to such annexation  
shall place a cross mark after the word "No."

Sec. 3. Ballot boxes shall be provided and votes counted and returned  
and the election conducted as regular municipal elections.

Sec. 4. The clerk of council [or village clerk] is hereby directed to  
publish this ordinance in a newspaper of general circulation in this cor-  
poration at least twenty days prior to the date of the election hereby au-  
thorized.

Sec. 5. This ordinance shall take effect and be in force from and after  
the earliest period allowed by law.

Passed this.....day of....., 19.....

.....  
President of Council.

Attest.....

Clerk.

Sec. 1609 R. S. [Result, if favorable, to be certified.] If a  
majority of the electors of each corporation, voting on the ques-  
tion so submitted, is in favor of such annexation, the trustees  
or council of each shall thereupon cause the result to be certified  
to the other corporation. [66 v. 268, § 700.]

Sec. 1610 R. S. [Council, etc., to appoint commissioners.]  
The trustees or council of each corporation shall then appoint,

by resolution or ordinance, three commissioners, whose duty it shall be to arrange the terms and conditions of such annexation, and report the result of their action to the trustees or council of their respective corporations. [66 v. 268, § 701.]

#### FORM OF RESOLUTION APPOINTING COMMISSIONERS.

Be it resolved by the council of the city [or village] of....., that ....., ....., and..... be and they are hereby appointed commissioners to represent the city [or village] of ..... in arranging with like commissioners from the city [or village] of..... the terms and conditions on which said city [or village] of..... is to be annexed to the said city [or village] of.....

And that said commissioners shall report the result of their action to the council of this corporation.

Adopted this..... day of....., 190...

**Sec. 1611 R. S. [Report of commissioners.]** When the report of such commissioners shall be approved by an ordinance passed by each corporation, certified copies thereof, signed by the presiding officer of the trustees or council of each corporation, and the respective clerks of the corporations, and authenticated by the corporate seal of each, if any there be, shall be filed in the office of the clerk of the corporation to which such annexation is proposed to be made. [66 v. 268, § 702.]

#### FORM OF ORDINANCE APPROVING REPORT OF COMMISSIONERS.

Ordinance No....

To approve report of Commissioners on annexation of city [or village] of..... to the city [or village] of.....

WHEREAS, The council of the city [or village] of..... on the ..... day of....., 19 .., duly passed an ordinance submitting to popular vote the question of the annexation of the city [or village] of ..... to said city [or village] and the city [or village] of..... on the..... day of..... passed a like ordinance submitting the same question to the qualified voters of that said city [or village];

AND WHEREAS, A vote was taken in each of the said corporations under the provisions of the respective ordinances, and a majority of the qualified voters in each corporation voted in favor of annexation on the question thus submitted;

AND WHEREAS, Thereupon the council of the city [or village] of ..... appointed....., ....., and ..... commissioners to act for said city [or village] and the council of the city [or village] of..... appointed....., ....., and ..... commissioners to act for that said city [or village] for the purpose of arranging the terms and conditions of such annexation, and said commissioners reported the terms of annexation as agreed to by them as follows: (Here insert the report of commissioners in full) :



Now therefore, be it ordained by the council of the city [or village] of  
....., State of Ohio:

Sec. 1. That the report of the said commissioners above set forth be and  
the same is hereby approved.

Sec. 2. This ordinance shall take effect and be in force from and after  
the earliest period allowed by law.

Passed this.....day of....., 19 ...

.....  
President of Council.

Attest.....

Clerk.

**Sec. 1612 R. S. [Clerk of corporation to make transcripts.]**  
The clerk shall, under the direction of the corporation, make  
and certify two transcripts of all the ordinances, abstracts of  
the returns of the votes, and other papers relating to such an-  
nexation, one of which shall be filed in the office of the recorder  
of the county, who, having made a record thereof, shall file and  
preserve it, and the other shall be forwarded by such clerk to  
the secretary of state. [66 v. 268, § 703.]

**Sec. 1613 R. S. [When annexation to be deemed complete;  
power of corporation thereafter.]** When the transcripts are cer-  
tified, and one of them is delivered to the recorder and the  
other forwarded to the secretary of state, as aforesaid, the an-  
nexation shall be deemed complete; and the corporation to  
which the annexation is made may pass such ordinances as will  
carry into effect the terms thereof, so far as the same are not  
inconsistent with this title, and with the regular and proper  
government of the corporation under its provisions; and any  
part of such terms so inconsistent shall be deemed void, but  
their nullity shall in no manner affect such annexation. [66 v.  
268, § 704.]

**Sec. 1614 R. S. [Corporations to be governed as one; not to  
affect rights or liabilities.]** When the annexation is completed,  
the two former corporations shall be governed as one, embracing  
the territory of each; and the inhabitants of all such territory  
shall have equal rights and privileges; but such annexation shall  
not affect any rights or liabilities existing at the time of the  
annexation, either in favor of or against the corporations; and  
suits founded on such rights and liabilities may be commenced,  
and pending suits prosecuted to final judgment and execution,  
as though such annexation had not taken place.<sup>1</sup> [66 v. 268,  
§ 705.]



**(1) Territory annexed pending merger of municipalities.**—If while proceedings to annex territory to a village are pending, the village is annexed to a city, the people of such territory become a part of the city, although they did not participate in the vote on the question of annexation of the village to the city; and they have no remedy against becoming part of the city. *Mohn v. Collins*, 32 B. 77.

**Taxes on annexed municipality alone.**—A tax which by agreement between a city and a village annexed to it was levied on the village property alone to pay the bonds of the village, is not void for want of uniformity. *Cleveland v. Heisley*, 41 O. S. 670.

The existence of the village annexed is continued only so far as to legalize the tax for its debt. *Ib.*

But such tax must not with the other taxes levied on said territory exceed the statutory limit. *Ib.*

**Agreement as to grades.**—An agreement in the terms of annexation stipulating that street grades should not be altered except by consent of property owners or the payment of damages is void so far as it is a contract not to legislate and has the effect merely of putting the grades on the same basis as city grades and gives abutting property owners no greater rights. *Thale v. Cincinnati*, 1 N. P. 427; *Corry v. Cincinnati*, 22 B., 194.

**Rights after annexation.**—A city which has annexed a village has no greater rights with respect to a street railway within the limits of the village than the village had. *Cincinnati v. Street Railway*, 17 B. 192.

**Sec. 1615 R. S. [How part of village attached to a city; existing indebtedness.]** When a city and village adjoin each other, and the inhabitants of any portion of the territory constituting a part of such village desire to be detached therefrom, and annexed to such city, the commissioners of the proper county, on the application of the council of the city, and on the written request of two-thirds of the legal voters inhabiting the territory proposed to be so annexed, may cause such alteration to be made, and the boundaries of such city, and such village, respectively, to be established in accordance with such application and request, and such territory shall thereafter constitute a part of such city; provided, that in all their proceedings in the premises, the county commissioners shall, as far as the same are applicable, be governed by the provisions of this division, prescribing the manner of proceeding on applications for the annexation of adjacent unincorporated territory to villages and cities;<sup>1</sup> and provided further, that the commissioners shall ascertain and apportion the amount of the existing indebtedness of the village, which shall be assumed and paid by the city on the annexation of the territory aforesaid. And said apportionment shall be made in the proportion of the total tax duplicate for the annexed territory transferred to the city, to the total tax duplicate remaining in and for the unannexed portion of the village,

and to ascertain, adjust, and divide between the city and the unannexed portion of said village, all moneys and other credits belonging to the village in the same proportion as is above provided for division and apportionment of any indebtedness, and to order the amounts so adjusted and divided to be paid or delivered by the parties in possession thereof to the city and unannexed portion of said village.<sup>2</sup> [88 v. 39; 68 v. 85, § 1.]

(1) **What provisions applicable.**—The provisions of §§ 1589 to 1605, referred to, govern, not alone the actions and duty of the county commissioners under § 1615, but the entire procedure, including action of municipal authorities. *Rost v. Glenville*, 1 N. P. (N. S.) 65. So the annexation is not complete until the indebtedness has been apportioned and the municipality has, by proper

corporate action, accepted the annexation. *Ib.* See further, as to what specific provisions are applicable. *Pollock v. Toland*, 1 C. C. (N. S.) 315; 25 C. C. 75.

(2) **Forms.**—See forms under § 1589, § 1590, and § 1591. These forms may be adapted to suit the circumstances of the case provided for in this section.

See notes to § 1614 above.

#### SUBDIVISION 4. DETACHMENT OF TERRITORY FROM MUNICIPAL CORPORATIONS.

**Sec. 1616 R. S.<sup>1</sup>** [How territory detached from municipal corporation and attached to township.] Upon petition of a majority of the freehold electors owning lands in any portion of the territory of a city, village or hamlet<sup>2</sup> accurately described in such petition, with an accurate map or plat thereof, praying to have the said portion of territory detached from said city, village or hamlet, the commissioners of the county in which such portion of territory is situated, shall, with the assent of the council of the city or village or trustees of the hamlet, given in an ordinance passed for that purpose, and not otherwise, detach such portion of the territory from such city, village or hamlet and attach the same to any township contiguous thereto, or, if the petition so request, shall erect the same into a new township, the boundaries of which need not include twenty-two square miles of territory; and the petition, map, ordinance, and the order of the commissioners, certified by the county auditor, shall be recorded in the plat book in the office of the county recorder, and as soon as the record is made, the proceeding shall be deemed complete, both as to the detaching of such territory from the municipal corporation and the annexation thereof to the township, or the erection of such territory into the new township.<sup>3</sup> [1904, April 21, 97 v. 143; 95 v. 120; 74 v. 109.]

(1) This section was enacted April 10, 1902, (95 v. 120), to amend § 1616 R. S. and under § 212 of the code is to be regarded as expressly re-enacted. The section was again amended April 21, 1904.

(2) See note "Status of Hamlets" under § 1 of the code.

(3) **Forms.**—The forms given under §§ 1589, 1590, and 1591, may be adapted to suit the circumstances provided for in this section.

“An act to provide for detaching unplatted farm lands from cities and incorporated villages, and for attaching the same to adjacent townships.”

[Sec. 1.] [Petition for detachment of unplatted farm lands.] The owner or owners of unplatted farm lands lying within the corporate limits of any city or village may file a petition in the court of common pleas of the county in which such lands are situate, in which such owner or owners shall be named as plaintiffs, and such city or village shall be the defendant, setting forth the reasons why such lands should be detached, and the relief prayed for. On such petition a summons shall issue as in other actions, and such cause proceed as in other causes. [April 23, 1902, 95 v. 259.]

FORM OF PETITION FOR DETACHMENT OF UNPLATTED FARM LANDS FROM A MUNICIPAL CORPORATION.

Court of Common Pleas, .....County, Ohio.

|                          |             |
|--------------------------|-------------|
| .....                    | } PETITION. |
| Plaintiff.               |             |
| vs.                      |             |
| The City [or village] of |             |
| .....                    |             |
| Defendant.               |             |

Plaintiff says that he is the owner of the following described property, to-wit: (Here insert description of farm lands sought to be detached.)

Plaintiff further says that the said property above described is unplatted farm land and lies within the corporate limits of the city [or village] of.....

Plaintiff further says that the said land should be detached from the said city [or village] for the reason that (here set forth the reasons why the land should be detached).

Wherefore, plaintiff prays that the said property may be detached from the city [or village] of.....and be attached to the adjacent township of.....in said county of.....and for all other relief to which he may be entitled.

.....  
Attorney for Plaintiff.

[Sec. 2.] [Decree of court.] On the hearing of such cause if the court shall find that said lands are farm lands and that the same may be detached without materially affecting the good government of adjacent territory within such city or village limits, an order and decree may be made by the court in his discretion and entered on the record that such lands be detached from such city or village and be attached to the most convenient



adjacent township in the same county, and thereafter such land shall not be a part of said city or village, and shall be a part of the township to which the same has been so attached, and the costs taxed as to the court may seem right.<sup>1</sup> [April 23, 1902, 95 v. 250.]

(1) **Validity.** This act held constitutional. It does not confer legislative power on the court. Fairview v. Giffey, 73 O. S. 183; Grover

Hill v. McClure, 27 C. C. 376; 6 C. C. (N. S.) 197 (aff'd 72 O. S. 676.)

#### FORM OF DECREE FOR DETACHMENT.

Court of Common Pleas,.....County, Ohio.

|                          |           |
|--------------------------|-----------|
| .....                    | } DECREE. |
| Plaintiff,               |           |
| vs.                      |           |
| The City [or village] of |           |
| .....                    |           |
| Defendant.               |           |

This cause coming on to be heard upon the pleadings and evidence and the Court being fully advised finds that the lands in the petition described are farm lands unplatted and within the corporate limits of the city [or village] of.....; that the said lands may be detached from the said city [or village] without materially affecting the good government of adjacent territory within said city [or village] limits.

Wherefore, it is ordered, adjudged and decreed that said lands be detached from the said city [or village] of.....and be attached to the adjacent township of.....in the said county of.....



## II

## POWERS OF MUNICIPALITIES.

## 1. GENERAL POWERS.

**Sec. 7. [General powers of municipalities.]**<sup>1</sup> Every city and village shall be a body politic and corporate,<sup>2</sup> which shall have perpetual succession, may use a common seal,<sup>3</sup> sue and be sued,<sup>4</sup> and acquire property by purchase, gift, devise, or appropriation for any municipal purpose herein authorized,<sup>5</sup> and hold, manage and control the same and make any and all rules and regulations, by ordinance or resolution, that may be required to carry out fully all the provisions of any conveyance, deed or will, in relation to any gift or bequest. All municipal corporations shall have the following general powers<sup>6</sup> and council may provide by ordinance or resolution for the exercise and enforcement of the same:<sup>7</sup>

(1) **Old sections.**—See old Sections 1552 R. S. and 1692 R. S. repealed; 95 v. 16, 78, 274, 526, 561, all repealed by the Code.

(2) **Corporation within federal statutes.**—A civil township made a body politic and corporate by state statute is a corporation within the meaning of the federal judiciary act of 1888. *Loeb v. Columbia Township*, 12 O. F. D. 349.

(3) **Corporate Seal.**—§ 1745 R. S., not expressly re-enacted, but still in force, because not repealed and not inconsistent with other provisions of the Code, provides for form of seal, and makes the Mayor custodian of the seal of the corporation. See *Tiffin v. Shawhan*, 43 O. S. 178, 186.

(4) **Actions.**—*How conducted.*—Old section 1552 R. S. was held to confer the power to sue upon council, and it was not necessary that every action should be brought by the solicitor of the corporation. *Deatrick v. Defiance*, 1 C. C. 340. Where municipality attempts to confess judgment under section 5321 R. S., it is necessary that the municipality's legal representative appear in open court and confess judgment on behalf of the municipality. The word "person" in section 5321 applies to municipal corporations. *Walcutt v. Columbus*, 13 Dec. 561; 1 N. P. (N. S.) 225. The word "persons" in section 5601 R. S., includes municipal corporations. *Springfield v. Walker*, 42 O. S. 543.

*Where brought.*—Where city is situated partly in two counties, action must be brought where its offices and government are conducted. *Fostoria v. Fox*, 60 O. S. 340.

**Claim due village changed to city.**—The city suing for a claim formerly due a village from which the city has been advanced will not be required, on motion, to set out the manner by which it was advanced from the village to the city. *Deatrack v. Defiance*, 1 C. C. 340.

**No action on quantum meruit against municipality.**—To state a good cause of action against a municipality in matters *ex contractu* the petition must declare upon a contract, agreement, obligation or appropriation made and entered into according to statute. A petition on account merely or *quantum meruit* in such case is not sufficient. *Wellston v. Morgan*, 65 O. S. 219.

See further as to municipal liability on contracts, notes under § 143, p. 372.

(5) **Scope of power to purchase, hold and sell.**—Matters relating to scope of power of municipality to purchase, hold and sell real estate, see note 2 under Code, par. 26, p. 62.

(6) **Municipal powers strictly limited.**—A municipal corporation has those powers only which are expressly granted to it, and such others as are necessary to carry out powers expressly granted. *Collins v. Hatch*, 18 Ohio 523; *Ravenna v. Pennsylvania Co.*, 45 O. S. 118; *Bancroft v. Wall*, 29 B. 306; *Gas & Water Co. v. Elyria*, 57 O. S. 374; *Cincinnati v. Gass*, 13 Dec. 703; 1 N. P. (N. S.) 169; *State v. Carter*, 67 O. S. 422, 433; *L. S. & M. S. Ry. Co. v. Elyria*, 69 O. S. 414.

Power to make contracts advan-

tageous to the municipality, same as that of an individual, see *Columbus v. Ry. Co.*, 2 C. C. (N. S.) 305, 25 C. C. 663.

**Estoppel.**—Persons dealing with municipality must, at their peril, take notice of the limitations upon its powers imposed by statute. *Lancaster v. Miller*, 58 O. S. 558, 575; *Hulbert v. Fitzsimmons*, 57 O. S. 436, 439.

Where municipality has power to act it may be estopped by acts or acquiescence, but where there is a total absence of power, there is no estoppel. *Horstman v. Street Ry. Co.*, 12 Dec. 756; *Cleveland v. State Bank*, 16 O. S. 236, 269. See further note (2) under § 143, p. 372.

**Power to pay equitable claims.**—Where claim is not collectible at law, but is just and equitable, and council has ordered its payment by ordinance, such ordinance is valid and equity will enforce the claim. *State ex rel v. Brown*, 8 C. C. 103; *State ex rel v. Wall*, 2 N. P. (N. S.) 517; 15 Dec. 349. Compare *State ex rel v. Fronizer*, 15 Dec. 349; 3 N. P. (N. S.) 303.

**Curative acts.**—Validity of acts declaring that things done and created under unconstitutional laws shall nevertheless continue to be and remain and be recognized and regarded as legal. See *Bartlett v. State*, 73 O. S. 54.

(7) **Provide for enforcement of powers.**—This clause was held to permit a village to provide that sewer assessments should be paid to the clerk, and that he should pay them into the debt fund. *State v. Carter*, 67 O. S. 432, 434.

For matters relating generally to the character of ordinances, see note 2 under § 122 of the code, page 312.

## (a) ENUMERATION OF GENERAL POWERS.

1. **[Riots, gambling, etc.]** To prevent riot, gambling, noise and disturbance, indecent and disorderly conduct or assemblages, and to preserve the peace and good order, and protect the property of the corporation and its inhabitants.<sup>1</sup>

(1) **Constitutionality.**—The right to confer police power on a city is implied in the constitutional

power to create a city. *Bliss v. Kraus*, 16 O. S. 54.

**Scope of power.**—Police power may be exercised by a city, but the

authority to enact any particular ordinance must be given expressly or by necessary implication. *Ravenna v. Pennsylvania Co.*, 45 O. S. 118. Where the grant is uncertain the power must be denied. *Wellsville v. O'Connor*, 1 C. C. (N. S.) 253; 24 C. C. 689, 690.

The exercise of the police power must be reasonable. Exacting a license fee of \$50 a day for transient dealers is unreasonable. *Glaser v. Cincinnati*, 31 B. 243. A city may prohibit disturbance of peace by singing, speech making, etc., in the street and it is no defense that such acts are done in conducting religious exercises. *Trimble v. Bucyrus*, 9 D. 832. Such a section as this would give power to prohibit the publication of obscene matter. *O'Brien v. Cleveland*, 1 Clev. 100, 4 Dec. (Re) 189.

Under a section of former statutes similar to this, it was held that a municipal corporation has no power to prohibit the blowing of steam whistles within the corporation. *Whitcomb v. Springfield*, 3 C. C. 244; nor to compel a railroad to maintain watchman at crossing. *Ravenna v. Pennsylvania Co.*, 45 O.

S. 118; nor to make penal the running of horse cars without a driver or conductor. *Thornhill v. Cincinnati*, 4 C. C. 354.

A section such as this would not give power to exact a license from ticket brokers. *Frank v. Cincinnati*, 7 N. P. 146.

**Power to punish**, see § 2108 R. S., p. 64. The general power to "preserve the peace and good order" is limited by the provisions of § 2108 R. S. and the manner of the exercise of the power is governed by that section. *Wellsville v. O'Connor*, 1 C. C. (N. S.) 253; 24 C. C. 689. But see *Esch v. Elyria*, 27 C. C. 446; 7 C. C. (N. S.) 9.

**Municipal liability.**—Though a section such as this gives the power to prevent disturbance of the public peace and protect property, a municipality will not be liable for failure to exercise this power. *Western College v. Cleveland*, 12 O. S. 375; *Frederick v. Columbus*, 58 O. S. 538; *Green v. Muskingum County*, 3 C. C. (N. S.) 212; 23 C. C. 43.

Thus the failure to prevent a riot would not render the city liable for property destroyed. *Western College v. Cleveland*, 12 O. S. 375. *Robinson v. Greenville*, 42 O. S. 625.

**2. [Billiards, tenpins, etc.]** To regulate billiard and pool tables, nine or tenpin alleys or tables, and shooting and ball alleys;<sup>1</sup> and to authorize the destruction of instruments or devices used for the purpose of gambling.<sup>2</sup>

(1) **Scope of power.**—A keeper of a billiard table resort may be punished for keeping open on Sunday unless he observes the seventh day of the week instead of Sunday. *Billigheimer v. State*, 32 O. S. 435.

A statute forbidding the keeper of a public house or retailer of liquor to keep a bowling alley would be unconstitutional. *State v. Thompson*, 7 N. P. 630.

**Effect of prohibition.**—Where a nine-pin alley is forbidden a builder cannot recover for services in constructing. *Spurgeon v. McElwain*, 6 O. 442.

(2) **Gambling devices.**—Ordinary slot machines are devices used for gambling. *Fletcher v. State*, 18 C. C. 674; but when not, see *Heelman v. State*, 6 N. P. 258.



3. [Nuisance.] To prevent injury or annoyance from anything dangerous, offensive, or unwholesome;<sup>1</sup> to cause any nuisance to be abated;<sup>2</sup> and to regulate and compel the consumption of smoke,<sup>3</sup> and to prevent injury and annoyance from the same, and to regulate and prohibit the use of steam whistles.<sup>4</sup>

(1) **Scope of power.**—Under a section such as this a village may prohibit the storage of dynamite or other explosives in certain quantities within the corporate limits. *Hays v. St. Mary*, 55 O. S. 198.

Any municipality may, by ordinance, prohibit absolutely the transportation of nitro-glycerine through the streets, and such ordinance is not inconsistent with Section 6953 R. S. *Walter v. Bowling Green*, 26 C. C. 756; 5 C. C. (N. S.) 516. A fine of \$100.00 for violation is not excessive. lb.

An ordinance forbidding the transportation of any dead animals, fish or garbage, including condemned food, through the streets, by any person except the city contractor or his agents, was held void as violating the fourteenth amendment to the U. S. Constitution. *Bauer v. Casey*, 26 C. C. 598; 6 C. C. (N. S.) 69 (see 49 B. 299).

(2) **Nuisance.** *What is.*—What amount of annoyance or inconvenience will constitute a nuisance depends upon circumstances, and a nuisance cannot be precisely defined. *Columbus, etc., Co. v. Free-land*, 12 O. S. 392.

Houses of ill fame are nuisances, subject to municipal regulation. *Crofton v. State*, 25 O. S. 249. So are hack-stands in streets. *Brana-han v. Hotel Co.*, 39 O. S. 333. Open pit in unenclosed lot in town. *Hess v. Lupton*, 7 O., pt. 1, 216. Boxing contests for prizes held in public. *State v. Hobart*, 8 N. P. 246.

But obstructions caused by building are not nuisances. *Clark v. Fry*, 8 O. S. 358. Nor bicycle riding on sidewalk. *Custer v. New Philadelphia*, 20 C. C. 177. Nor a stream of water. *Deming v. Cleveland*, 22 C. C. 1.

Gas works are not a nuisance, and

a municipality cannot arbitrarily declare them to be such, or, unless they in fact become a nuisance, prohibit them within a certain district or require that the consent of private property owners be obtained before permitting their operation elsewhere. *Defiance v. Gas and Electric Company*, 12 Dec. 424.

The drilling of gas or oil wells within a certain distance of dwellings may be prohibited. *Cline v. Kirkbride*, 22 C. C. 527.

Whether blasting with gunpowder in city is a nuisance, see *Tiffin v. McCormack*, 34 O. S. 638. Obstructing flow of water. *Tootle v. Clifton*, 22 O. S. 247.

The question what is and what is not a public nuisance is a judicial one, and it is not competent to delegate it to the local legislative or administrative boards; the local declaration that a nuisance exists is, therefore, not conclusive, and the party concerned may contest the fact in court. *Deming v. Cleveland*, 22 C. C. 1, 11.

*What nuisance may be abated.*—A city has no authority to cause to be abated any nuisance other than a public nuisance. *Whitcomb v. Springfield*, 3 C. C. 244.

*Extent of regulation of nuisance.*—City cannot create civil liability for nuisance. *Veigel v. Lukenheimer*, 10 B. 293; *Vandyke v. Cincinnati*, 1 Disney 532; *Chambers v. Ohio, etc., Co.*, 1 Disney 327.

Power in a municipality to compel removal of a nuisance includes power to require work done so as to prevent its recurrence. *Bliss v. Kraus*, 16 O. S. 54.

*Power of board of health over nuisances*, see § 2122 R. S., p. 425.

(3) **Extent of regulation of smoke.**—Under section such as this, giving power to regulate con-



sumption of smoke, a city is not authorized to declare that dense smoke is a nuisance *per se*, but only if it causes injury or annoyance. *Cleveland v. Malm*, 5 N. P. 203; *Sigler v. Cleveland*, 3 N. P. 119.

An ordinance prohibiting "dense" smoke is void, for uncertainty. *Ib.* Under this paragraph a city may create a supervising engineer's de-

partment to regulate and compel consumption of smoke. *Cincinnati v. Gass*, 13 Dec. 703; 1 N. P. (N. S.) 169. Power to appoint such engineer would vest in the mayor. *Ib.*

(4) **Steam whistles.**—Without this express grant of power council could not prohibit the blowing of steam whistles. *Whitcomb v. Springfield*, 3 C. C. 244.

**4. [Houses of ill fame.]** To suppress and restrain disorderly houses and houses of ill fame,<sup>1</sup> and to provide for the punishment of all lewd and lascivious behavior<sup>2</sup> in the streets and other public places.

(1) **Are nuisances.**—A house of ill fame is a nuisance. *Crofton v. State*, 25 O. S. 249.

**Defined.**—See § (4364-1) R. S.

**Powers of board of health.**—See § 2118 R. S. and notes, p. 422.

(2) **Lewd behavior.**—Ordinance prohibiting walking, riding or conversing with any lewd female, is not authorized by a section such as this. *Cady v. Barnesville*, 4 Dec. (Re) 396.

**5. [Intoxicating liquors.]** To regulate<sup>1</sup> ale, beer, porter houses and shops,<sup>2</sup> and the sale of intoxicating liquors as a beverage. But nothing in this act shall be construed to amend, repeal or in any way affect the provisions of an act entitled, "An Act to amend section 4364-20 of the Revised Statutes of Ohio, and to supplement said section by enacting supplementary sections 4364-20*a*, 4364-20*b*, 4364-20*c*, 4364-20*d*, 4364-20*e*, 4364-20*f*, 4364-20*g*, 4364-20*h* and 4364-20*i*," passed April 3, 1902. (95 O. L. 87.)<sup>3</sup>

(1) **Meaning of "regulate."**  
—For a consideration of the scope of the word "regulate," see *Brown v. Van Wert*, 4 C. C. 407, 411, and the same case in 47 O. S. 477, and

*Bronson v. Oberlin*, 41 O. S. 476, 483.

Power to regulate does not include power to prohibit saloons in certain districts. *Berning v. Norwood*, 1 O. L. R. 25, 29 (*aff'd* 72 O. S. 593).

(2) **As nuisances.**—Place of habitual resort for tippling is a nuisance. *Miller v. State*, 3 O. S. 475.

**Extent of power.**—Under a general statute giving power to pass ordinances for the "health, safety, morals, etc.," of the city, it was held a municipal corporation could not prohibit the opening of shops, including saloons, on Sunday without excepting cases of necessity and charity, and the case of those who conscientiously observe the seventh day of the week. *Canton v. Nist*, 9 O. S. 439. And could not prohibit the sale of wine, etc., in less quantities than a gallon. *Thompson v. Mt. Vernon*, 11 O. S. 688. But under a statute expressly giving the power to "regulate, restrain and prohibit ale, beer and porter houses," it was held a city has authority to provide for the punishment of the keeper of any place where ale, etc., is habitually sold or furnished, to be drunk at such place. *Burckholter v. McConnellsville*, 20 O. S. 308. And under a statute giving power to *regulate* such places, a municipality may prohibit and punish the employment of females in places where liquor is sold. *Bergman v. Cleveland*, 39 O. S. 651. And may forbid any person to keep such place open on Sunday, though no exception is made in cases of necessity or charity or in favor of those who conscientiously observe the seventh day of the week. *Piqua v. Zimmerlin*, 35 O. S. 507.

A part of an ordinance forbidding keeping open on Sunday, providing that lighting up of the room where liquor is sold shall be *prima facie* evidence of keeping open, though invalid, does not render the ordinance void. *Piqua v. Zimmerlin*, 35 O. S. 507.

An ordinance fixing the hours of closing and opening saloons, and requiring closing between ten P. M. and six A. M., is valid. *Weaver v. Mt. Vernon*, 7 N. P. 374. To the same effect, *Bauer v. Avondale*, 4 B. 12.

An ordinance requiring saloons to remove all screens and to have a bright light at ten o'clock at night is constitutional. Editorial note, 34 B. 39; *Washington v. Gallagher*, 7 N. P. 511.

**Exceptions in ordinance.**—Where a municipal corporation follows the authority given in a statute for the passage of an ordinance, it is not necessary to include all the exceptions in other statutes relating to the same subject matter. *Edis v. Butler*, 8 N. P. 183, (aff'd 68 O. S. 645).

An ordinance passed under a section such as this need not except drug stores. *Emery v. Elyria*, 8 N. P. 208.

There was held to be no inconsistency between paragraph 5 of § 1692 (which is similar to paragraph 5 of the present Code section) and § 4364-20 R. S., and an ordinance prohibiting keeping places where intoxicants are sold open on Sunday without containing the exceptions in § 4364-20 R. S. was held to be valid. *Emery v. Elyria*, 8 N. P. 208.

**State law on same subject.**—A village may pass a Sunday closing ordinance, although there is a state law to the same effect. *State v. Ulm*, 7 N. P. 659. But ordinance must contain exceptions provided in the statute under which it is passed. *Akerman v. Lima*, 7 N. P. 92.

Ordinances may be passed providing for punishment of some act which is made criminal by state statutes and offenders may be punished in both jurisdictions for the

same act. *Emery v. Elyria*, 8 N. P. 208.

The jurisdiction to punish under a state law and under a municipal ordinance is concurrent. *Wightman v. State*, 10 O. 452; and conviction in one jurisdiction would be a bar to prosecution in the other. *Ib.* But see *Emery v. Elyria*, 8 N. P. 208.

**Recovery of penalty.**—A civil

action may be maintained by a municipal corporation to recover the penalty imposed by ordinance for retailing intoxicating liquors. *Markle v. Akron*, 14 O. 586.

**Intoxicating liquors.**—Strong beer is an intoxicating liquor within the meaning of an ordinance forbidding retailing intoxicants without a license. *Markle v. Akron*, 14 O. 586.

(3) **Beal law** here referred to will be found on page 803 *et seq.*

**6. [Taverns.]** To regulate taverns and other houses for public entertainment.

**7. [Theatrical exhibitions and tickets.]** To regulate, by license or otherwise, restrain or prohibit theatrical exhibitions and public shows of whatever name or nature, for which money or other reward is demanded or received;<sup>1</sup> to regulate, by license or otherwise, the business of trafficking in theatrical tickets or other tickets of licensed amusements, by parties not acting as agents of those issuing the same, but public school entertainments, lecture courses and lectures on historic, literary or scientific subjects shall not come within the provisions of this section. [97 v. 505.]

(1) **License fees.**—Under a provision such as this a municipal corporation may exact a license fee from theatrical exhibitors. Such exaction is not violative of the constitution. *Baker v. Cincinnati*, 11 O. S. 534.

The authority to fix the amount of license fees may be delegated to the mayor within the limits fixed by council. *Ex parte Ryan*, 7 B. 50.

**Prohibition.**—Council could not prohibit a performance unless it were given for pay or reward. *Ex parte Ryan*, 7 B. 50.

**Sales of reserved seats after doors open.**—An ordinance forbidding sale of reserved seats after the doors are opened would be valid and a speculator who bought the tickets the day before would be subject to the prohibition. *Cincinnati v. Brill*, 7 N. P. 534.

**8. [Auctions.]** To regulate auctioneering;<sup>1</sup> and to regulate, license or prohibit the sale at auction of goods, wares and merchandise or of live domestic animals at public auction in the streets or other public places within the corporation;



and to regulate, license or prohibit the selling of goods, merchandise or medicines on the streets.<sup>2</sup>

(1) **"Auctioneer" defined.**—An auctioneer is a person who disposes of goods or lands by public sale to the highest bidder. *Crandall v. State*, 28 O. S. 479.

A person who, being in the business of selling merchandise at regular retail prices, sells a portion of them at his store-room by public outcry, but selling at the regular retail price, is not an auctioneer. *Ib.*

One merely employed in conducting the sale is not subject to prosecution under auction license law. *Cincinnati v. Withers*, 5 Dec. 570.

Criers of tobacco at warehouse sales held not to be auctioneers. *Cincinnati v. Withers*, 5 Dec. 570.

(2) **Regulation and license.**—Under the authority given by the statute "to regulate auctioneering" city councils, in view of promoting the order, comfort and convenience of the inhabitants, may pass ordinances regulating sales at auction upon the streets, alleys, sidewalks and public grounds of the city, and may subject the occupation of auctioneering to such police regulations as seem essential to the public convenience and protection. *Sipe v. Murphy*, 19 O. S. 536, 543.

Even without express statutory provision, but under the general laws to provide for the safety, health, etc., it is held a city may by ordinance prohibit sales at auction in the streets or public places of the city, and an ordinance of this

character would not be unreasonable or in restraint of trade. *White v. Kent*, 11 O. S. 550.

As to regulation and prohibition of sales at auction of goods imported into the corporation for that purpose, see *Sipe v. Murphy*, 49 O. S. 536; *Brunner v. Harrison*, 25 C. C. 247; 1 C. C. (N. S.) 111.

For provision for issuing the state license to auctioneers and payment of *pro rata* duties on all property and effects exposed to sale by public auction, see §§ 4222 to 4238 R. S.

Paragraph 9 of former section 1692 (which corresponds to paragraph 8 of the present section of the code) was held not to be inconsistent with sections 4222 to 4238 R. S. *Sipe v. Murphy*, 49 O. S. 536.

For further provision giving council power to license hawkers, peddlers, auctioneers of horses, etc., see § 2669 R. S., page 73.

**Reasonableness of license fee.**—A city ordinance imposing a fine of \$25.00 a day for auctioneering goods brought into city for that purpose is held an unreasonable exercise of power. *Sipe v. Murphy*, 49 O. S. 536. See also *Glazer v. Cincinnati*, 31 B. 243.

Ordinance charging \$20.00 per day as a license fee for selling goods held unreasonable. *Newark v. Flatau*, 39 B. 239; see also *Flatau v. Mansfield*, 13 C. C. 592, 597.

9. [Carriages, drays, street cars, etc.] To regulate the use of carts, drays, wagons, hackney coaches, omnibuses, automobiles, and every description of carriages kept for hire or livery-stable purposes; and to license and regulate<sup>1</sup> the use of the



streets by persons who use vehicles, or solicit or transact business thereon;<sup>2</sup> to prevent and punish fast driving or riding of animals, or fast driving or propelling of vehicles through the public highways; to regulate the transportation of articles through such highways and to prevent injury to such highways from overloaded vehicles, and to regulate the speed of inter-urban traction and street railway cars<sup>3</sup> within the corporation.

(1) **Scope of words "license and regulate."**—The power to license and regulate draymen, etc., implies the right of fixing the terms upon which they shall be permitted to exercise their calling, and of forbidding the exercise upon any other than the terms and in the manner prescribed. *Cincinnati v. Bryson*, 15 O. 625. Under such a section, a city may require a reasonable sum from draymen, etc., by way of excise, on the special employment. *Ib.* *Columbus v. Jeffrey*, 13 Dec. 639; 1 N. P. (N. S.) 265.

Power to license conferred on council by this paragraph must not only be construed strictly, but the object of such power so granted by the state, unless there be language indicating that the grant is conferred for the purpose of revenue, must be construed as one for regulation merely, and an exercise of the police power, and not of the taxing power; and revenue can be raised only as an incident to regulation. *Columbus v. Jeffrey*, 13 Dec. 639; 1 N. P. (N. S.) 265.

But ordinance will be presumed, in absence of evidence to the contrary, to be intended to defray cost of regulation, and not to raise revenue. *Columbus v. Jeffrey*, 16 Dec. 330.

(2) **Scope of power.**—An ordinance requiring a license fee of all persons using the streets with ve-

hicles, and requiring license tags on vehicles, is constitutional. *Sterling v. Bowling Green*, 26 C. C. 581; 5 C. C. (N. S.) 217; see also *Marmet v. State*, 45 O. S. 63; *Little v. State*, 8 C. C. 51.

The word "vehicles" includes all classes and kinds of conveyances, and was not intended to be confined to conveyances kept for hire. *Sterling v. Bowling Green*, 26 C. C. 581; 5 C. C. (N. S.) 217.

Power conferred upon the auditor and chief of police, in an ordinance licensing vehicles using the streets, to examine vehicles, if not satisfied with description furnished by applicant for license, is not judicial and does not invalidate the ordinance. *Sterling v. Bowling Green*, 26 C. C. 581; 5 C. C. (N. S.) 217.

Speed ordinance applying to territory outside of municipality as well as territory within, is not for that reason void, but is simply inoperative in such outside territory. *Chittenden v. Columbus*, 26 C. C. 531; 5 C. C. (N. S.) 84.

**Ordinance operating unequally.**—An ordinance operating unequally as between resident and non-resident owners of vehicles, as one excepting from its operation vehicles used by persons living outside the municipality, is invalid. *Columbus v. Jeffrey*, 13 Dec. 639; 1 N. P. (N. S.) 265 (aff'd Circuit Court); *Columbus v. Jeffrey*, 16 Dec. 330.

An ordinance imposing a license fee on persons using the streets with vehicles and, with reference to non-residents, applying only to those hauling heavy articles or peddling milk, vegetables, etc., is not invalid as discriminating unfairly between residents and non-residents. *Sterling v. Bowling Green*, 26 C. C. 581; 5 C. C. (N. S.) 217.

An ordinance is not unreasonable because it limits the speed of automobiles and bicycles to seven miles per hour; or because different rates of speed are prescribed for different portions of a prescribed district. *Chittenden v. Columbus*, 26 C. C. 531; 5 C. C. (N. S.) 84.

Ordinance regulating speed of automobiles is not void because another ordinance allows street cars to run at a greater speed. *Chittenden v. Columbus*, 26 C. C. 531; 5 C. C. (N. S.) 84.

A license fee for the use of the streets by vehicles may be graded according to the number of horses used. *Marmet v. State*, 45 O. S. 63, 76.

**Hackstands.**—A city, under the general power to regulate hacks, may prohibit hackmen soliciting patronage at railway depots. *Moerder v. Fremont*, 19 C. C. 394. See also *Snyder v. Depot Co.*, 19 C. C. 368.

A hackstand on side of street where stores front is a nuisance, and an ordinance allowing such stand is invalid. *Branahan v. Hotel Co.*, 39 O. S. 333.

Power to establish hackstands, see § 2671 R. S., p. 79.

**Automobiles.**—See "an act to compel owners and operators of motor vehicles to register with the Secretary of State" (98 O. L. 320) for state law limiting power of

municipalities in regulating use of streets by automobiles.

**Street railways.**—This section does not confer power to impose license fees on street or interurban railway companies for use of streets. *Columbus v. Jeffrey*, 13 Dec. 639; 1 N. P. (N. S.) 265.

Under this section a municipality may, by ordinance, require stopping of street cars at any regular stopping place, upon signal. *Lockyear v. Covert*, 2 C. C. (N. S.) 389; 25 C. C. 486.

(2) **Speed of street cars.**—An ordinance providing that the "schedule time" for operating electric street railway cars shall not exceed ten miles an hour, is invalid as being unreasonable in allowing such cars to be run at any rate of speed provided the "schedule time" in going over the entire route, does not exceed ten miles an hour. *Lewis v. Cincinnati*, 8 N. P. 417. But see same case in 23 C. C. 127, where question is left open. See also *Gannon v. St. Ry. Co.* 64 O. S. 567.

With or without an ordinance, the law requires of the railway company "reasonable safety, in view of the facts and surrounding conditions." *Lewis v. Cincinnati*, 23 C. C. 127.

An old ordinance passed to apply to horse cars would not be applicable to electric street railways. *Ib.*

**Effect of ordinance.**—Ordinance regulating speed does not determine liability between company and individuals in case of accidents, but may go to the jury on the question of negligence. *Becker v. St. Ry. Co.* 1 N. P. 359; *East Cleveland R. R. Co. v. Rosecrans*, 24 B. 220; *Ulrich v. Toledo Consol. St. Ry. Co.*, 67 O. S. 508 (see 10 C. C. 635).

See further note (2) under code § 122, p. 312.

10. [**Animals running at large.**] To regulate, restrain and prohibit the running at large, within the corporation, of cattle, horses, swine, sheep, goats, geese, chickens and other fowls and animals, and to impound<sup>1</sup> and hold the same, and on notice to the owners, to authorize the sale of the same for the penalty imposed by any ordinance, and the cost and expenses of the proceedings; and to regulate or prohibit the running at large of dogs, and provide against injury and annoyance therefrom, and to authorize the disposition of the same when running at large contrary to the provisions of any ordinance.<sup>2</sup>

(1) **Pounds.**—For provision as to pounds in villages, see § 4209-1 R. S.

(2) **Cannot be abated as nuisance.**—Authority to regulate running at large of animals is not given by general provisions giving cities power to abate nuisances.

This power can be exercised only when specifically granted. *Collins v. Hatch*, 18 O. 523.

**Dog tax.**—A *per capita* dog tax may be imposed as a police regulation. *Holst v. Roe*, 39 O. S. 340.

11. [**Explosives.**] To regulate the transportation, keeping and sale of gunpowder and other explosives or dangerous combustibles and materials and to provide or license magazines for the same.<sup>1</sup>

(1) **Scope of section.**—Ordinance regulating transportation of dynamite and other explosives in certain quantities along streets of villages, is within scope of section such as this. *Hays v. St. Marys*, 55 O. S. 197.

Under paragraph 3 of § 7, municipality has power to prohibit absolutely the transportation of nitroglycerine through the streets. *Walter v. Bowling Green*, 26 C. C. 756; 5 C. C. (N. S.) 516; and under both paragraphs 3 and 11 the storage of

dynamite or other high explosives in certain quantities within the municipality, may be prohibited by ordinance. *Hays v. St. Marys*, 55 O. S. 197. Such a provision in an ordinance is not inconsistent with §§ 6953, 8853-4 to 8853-8 R. S. *Ib.*

**Forfeiture.**—Under section such as this, there is no authority to decree a forfeiture of gunpowder, nor can a forfeiture be declared without notice and adjudication. *Cotter v. Doty*, 5 O. 394.

**Municipal liability.**—Municipi-



pality is not liable for damages against storing of inflammable oils. caused by fire resulting from its Roberts & Co. v. Cincinnati, 5 Rec. failure to enforce an ordinance 73.

**12. [Weighing.]** To regulate the weighing and measuring of hay, wood and coal and other articles exposed for sale, and to provide for the seizure, forfeiture and destruction of weights and measures, implements and appliances for measuring and weighing which are imperfect or liable to indicate false or inaccurate weight or measure, or which do not conform to the standards established by law and which are known, used or kept to be used for weighing or measuring articles to be purchased, sold or offered or exposed for sale.<sup>1</sup>

**(1) Character of regulations.**  
— A state statute making it penal to use any measure but standard half bushel when buying wheat from original producer was held unconstitutional because it protects only the producer and not those selling to him and is class legislation. *Yezell v. State*, 40 B. 63.

Under its charter of 1834 and the general laws of the state it was held that Cincinnati could appoint a

sealer of weights and measures and enforce by fine the use of weights and measures sealed by him. *Huddleson v. Ruffin*, 6 O. S. 604.

The power to provide for weighing and measuring of articles for sale does not authorize an ordinance forbidding the delivery in the city, without being weighed by the city weigher of hay already sold outside the city. *Heminger v. Cleveland*, 3 W. L. M. 46.

**13. [Buildings, fences, etc.]** To regulate the erection of buildings<sup>1</sup> and the sanitary condition thereof, fences, bill boards,<sup>2</sup> signs, and other structures within the corporate limits; to require, regulate and provide for the numbering and renumbering of buildings either by the owners or occupants thereof or at the expense of the municipality; to name or rename streets, alleys, highways and public places; to regulate the repair of, alteration in and addition to buildings; to provide for the construction, erection and placing of elevators, stairways and fire escapes in and upon buildings;<sup>3</sup> to regulate the construction and repair of wires, poles, plants and all equipment to be used for the generation and application of electricity; to provide for the removal and repair of insecure buildings, bill boards, signs



and other structures, and to provide for the inspection of all buildings or other structures<sup>4</sup> and for the licensing of house-movers, plumbers and sewer-tappers and vault cleaners.<sup>5</sup> [97 v. 506.]

(1) **Buildings already erected.**

—A municipal ordinance limiting the height of wooden structures in a certain specified quarter of the city cannot affect an owner whose building was erected before passage of the ordinance and who seeks to move it to another part of the same quarter. *Cleveland v. Lenze*, 27 O. S. 383.

(2) **Licensing bill posters.**— See §§ 2669b and 2669c R. S. *infra*.

**Regulation of material used.**—

An ordinance requiring the use of such incombustible material in the erection of signs and bill boards within the fire limits as will prevent the spread of fire and requiring the erection of the same in a safe and secure manner is valid. *Cleveland v. Bryan*, 8 N. P. 552.

**Prohibiting bill boards.**— Under the former statutes, giving power to municipalities merely “to regulate the erection of buildings, fences and other structures” it was held that an ordinance entirely forbidding the erection of signs, bill boards and structures for advertising was beyond the power of the municipality and void. *Cleveland v. Bryan*, 8 N. P. 552.

Such an ordinance prohibiting bill boards at a greater height than two feet above the level of the adjoining street and nearer than 15 feet from the building line on the street was held to be unconstitutional and void, under the former statutes, as a deprivation of the use of property. *Ib*.

(3) **Fire escapes.**—A law requiring owners of certain kinds of buildings to provide fire escapes on thirty days’ notice and empowering court to enjoin use of building until owner does so, is valid as a proper exercise of police power. *Cincinnati v. Steinkamp*, 54 O. S. 284.

(4) **Discretion of building inspector.**—A building inspector’s discretion in issuing a permit cannot be interfered with by injunction. *Collins v. Cleveland*, 2 Low. D. 380. See also *Leibschutz v. Black*, 15 Dec. 372; 3 N. P. (N. S.) 392.

(5) **Regulation of sewer connections.**—Section 1692f (2) R. S., repealed, the language of which is similar to part of paragraph 13 above, was held not to authorize a provision in an ordinance that catch basin water closets must be constructed and sewer connections made only by licensed sewer tappers. *State v. Tooker*, 5 N. P. 122.

**14. [Police and fire departments.]** To organize and maintain police and fire departments, erect the necessary buildings and purchase and hold all implements and apparatus required therefor.<sup>1</sup>

(1) **Other code provisions relating to police and fire departments,** see § 146 et seq. of the code, *infra*.

As to municipal power and duties see notes under § 146 et seq.

**15. [Waterworks; lighting, power and heating plants.]**

To provide for a supply of water, by the construction of wells, pumps, cisterns, aqueducts, water pipes, reservoirs and waterworks, and for the protection thereof, and to prevent unnecessary waste of water, and the pollution thereof, and to apply moneys received as charges for water to the maintenance, construction, enlargement and extension of the works, and to the extinguishment of any indebtedness created therefor;<sup>1</sup> and to establish and maintain municipal lighting, power, and heating plants, and to establish, maintain and operate natural gas plants and to furnish the municipality and the inhabitants thereof with natural gas for heating, lighting and power purposes,<sup>2</sup> and to acquire by purchase, lease or otherwise the necessary lands for such purposes, within and without the municipality.

**(1) Use of stream as riparian owner.**—Municipality situated on natural flowing stream is a riparian proprietor, and may use for its own purposes and for domestic use of its inhabitants whatever water is necessary without liability to lower proprietor. *Canton v. Shock et al.*, 66 O. S. 19.

Such municipality has no right to materially diminish flow of water to injury of lower proprietor by supplying water from the stream to persons outside the municipality or by supplying to factories for power purposes more than a reasonable share of the water. *Ib.*

**Contract with mill owner.**—It was held under former §§ 2409-2415 R. S. that trustees of water works might contract with mill owner for part of his slack water for their works. *Fremont v. June*, 8 C. C. 124.

**Nature of water rent.**—Rent for use of water is an assessment

rather than a tax, and if not paid the premises can be sold to pay it. *Gallipolis v. Trustees*, 2 N. P. 161; *Alter v. City*, 56 O. S., 47.

**What property assessable for water rent.**—Property not adjoining, abutting or bounding on street through which water pipe has been laid, held not assessable for paying interest on loan to erect water works. *Wheeler v. Zanesville*, 3 C. C. 596.

**Power limited.**—Power to assess and collect water rents is limited by the statute conferring it. See *Ramsey v. Columbus*, 12 Dec. 725.

**(2) Other sections on gas works.**—The sections of the Revised Statutes relating to ownership and regulation of gas works (2478-2486; 2490, 2491) which are general in their operation have not been repealed by the Code. In the clause above, however, the additional power to construct and operate heating plants is given.

16. [Health.] To provide for the public health;<sup>1</sup> to secure the inhabitants of the corporation from the evils of contagious, malignant and infectious diseases, and to purchase or lease property or buildings for pest houses, and to erect, maintain and regulate pest houses, hospitals and infirmaries.<sup>2</sup> [97 v. 507.]

(1) **Board of Health.**—The present clause does not give authority to establish a board of health as did clause 24 of § 1692 to which the present clause corresponds. The board which is to carry out the powers here granted is elsewhere provided for. (§§ 187 to 189 inclusive of the Code.)

(2) **Scope of regulations.**—An ordinance providing a reasonable charge for supervising the work of removing the contents of privy vaults and for removing the bad effects thereof, for which the person cleaning is primarily responsible and covering the costs of issuing permits to do the work, and of collection would be legal. *Toledo v. Buechele*, 21 C. C. 429.

But a charge to cover the expense of disinfecting the work, an expense which should fall on the owner or the city, cannot be laid upon the person doing the work. *Ib.*

An ordinance providing that no person shall sell milk in a city without a permit from its acting board of health and authorizing examination and inspection of milk sold in the city, the places where produced and the cattle producing it and prescribing regulations regarding health of employees, etc., was held to be a health ordinance exclusively and to be within paragraph 24, § 1692 R. S., to which the present section corresponds. *Walton v. Toledo*, 3 C. C. (N. S.) 295; 23 C. C. 547, (aff'd 69 O. S. 548).

Such an ordinance is constitutional. *Ib.*

An ordinance relating to the sale of milk may require a fee of one dollar for each wagon used in the city in selling milk and require a tag to be attached to every such wagon before a permit will be granted. Such a charge is not a license in violation of § 2669 R. S. *Ib.*

17. [Cemeteries and crematories.] To provide public cemeteries and crematories for the burial or incineration of the dead and to regulate public and private cemeteries and crematories.<sup>1</sup>

(1) **Other provisions** relating to cemeteries, see § 2516 *et seq.* R. S. *infra*, and see notes thereunder.

**Managing board.**—See note to § 2521 R. S.

18. [Streets, wharves, etc.; conduits; rolling roads.] To lay off, establish, plat, grade, open, widen, narrow, straighten, extend, improve, keep in order and repair, light, clean and sprinkle streets, alleys, public grounds, places and buildings, wharves, landings, docks, bridges, viaducts and market places within the corporation,<sup>1</sup> including any portion of any turnpike or plank



road therein, surrendered to or condemned by the corporation; to regulate public landings, public wharves, public docks, public piers and public basins,<sup>2</sup> and to fix the rates of landing, wharfage, dockage and the use of the same; and to regulate the planting, trimming and preservation of shade trees in streets, alleys, public grounds and places, and to provide for the planting, removal, trimming and preservation of such trees and other ornamental shrubbery; and to use, or by ordinance grant, for periods not exceeding twenty-five years, the use of its streets, avenues, alleys, lanes and public places, to lay pipes, conduits, manholes, drains and other necessary fixtures and appliances, under the surface thereof, to be used for supplying such municipality and its inhabitants with steam or hot water, or both, for heat or power purposes or both; and to use or grant, for periods not exceeding twenty-five years, the use of its streets, avenues, alleys, lanes and public places for the construction of inclined movable or rolling roads, for the conveying or moving of freight, vehicles, animals and other property, and those in charge of the same, upon such terms as the council of such municipal corporation may deem proper; provided, that such municipal corporations shall in all such grants reserve the right to regulate, at intervals of not less than five (5) years, the prices which the grantee or grantees may charge for such heat or power, or for the conveying or moving of such freight, vehicles, animals and other property; and provided, further that no grant for the use of such streets, avenues, alleys, lanes and public places for the construction of such inclined movable or rolling roads shall be made until there is produced to the council of such municipal corporation the written consent of the private property owners of more than two-thirds of the feet front of such lots and lands abutting on the street, avenue, alley, lane or public place, or part thereof, upon or over which it is proposed to construct such inclined movable or rolling road. And that in all municipal corpora-



tions which may have heretofore, by ordinance authorized the use by any person or corporation, of the streets, avenues, alleys, lanes and public places of such municipal corporation for the purpose of laying pipes and drains below the surface thereof to convey and supply its inhabitants or the corporation, or both, with heat by means of steam or hot water, or both, such ordinance shall be held as valid and binding as if the power in the corporation to so grant such use of its streets, avenues, alleys, lanes and public places had been expressly provided by statute prior to the passage of such ordinance and in force when the same was passed;<sup>3</sup> provided that the council of any such corporation shall have power to regulate, by ordinance, at intervals of five years the price which such person or company may charge for such heat or power. [97 v. 507.]

(1) **Powers held in trust for the public.**—The powers conferred on municipal corporations with respect to the opening, improving and repairing of their streets and public ways are held in trust for public purposes and are continuing in their nature, to be exercised from time to time as public interest requires. *R. R. Co. v. Defiance*, 52 O. S. 262.

They cannot be granted away or relinquished or their exercise suspended or abridged except when express legislative authority is given. *Ib.*

**Municipal power and liability.**—For matters relating to power of council over streets, etc., and duty to keep same in repair, etc., and liability for failure to keep in repair,

etc., see code § 28 *et seq.*, p. 112, and notes.

(2) **Wharfage regulations.**—A city ordinance requiring every “steamboat, barge, keelboat and flatboat” to pay wharfage rent does not include a ferryboat. *Cincinnati v. Walls*, 1 O. S. 222. As to rights of grantee of wharf privileges by city, see *Cincinnati v. C. & C. Bridge Co.*, 20 C. C. 396.

(3) **Validity.**—This curative provision held valid. *Columbus v. Heating & Lighting Co.*, 16 Dec. 311.

Effect of ordinance repudiating previous *ultra vires* ordinance of character cured by this section, where no legal proceedings had to have such *ultra vires* ordinance declared invalid. See *Ib.*

19. [Canals and sewers.] To construct, open, enlarge, excavate, improve, deepen, straighten, or extend any canal,<sup>1</sup> ship canal or watercourse<sup>2</sup> located in whole or in part within the corporation, or lying contiguous and adjacent thereto; to open, construct and keep in repair sewage disposal works, sewers,<sup>3</sup> drains and ditches,<sup>4</sup> to license ferries, to regulate the use of public docks and public landings, and to establish, repair and regulate water closets and privies.<sup>5</sup>

(1) **Effect of grant of canal to city.**—After a grant by the state to a city of a portion of a canal, to be used for street and sewer purposes, operating as an abandonment of it for canal purposes, a conveyance by the state to a private individual of the right to surplus water for power, did not vest in such individual a right paramount to that of the city to make use of the part abandoned in such manner as involved the destruction of the water power. *Elevator Co. v. Cincinnati*, 30 O. S. 630.

Abandonment of a canal to a city by the state casts a liability on the city for such damages only as would constitute a demand against the state. *Hubbard v. Toledo*, 21 O. S. 379.

A grant from the state authorizing the city of Toledo to enter upon and occupy a part of the Miami and Erie canal as a public highway was an abandonment of the canal by the state to the city. *Ib.*

When the state grants to a city a canal for street purposes and afterwards conveys to the city all its rights in such land the latter deed gives the city an ownership discharged from any easement in the public and it can sell the land. *Paige v. Cherry*, 17 C. C. 579.

The state may abandon any part of its canal though grantees of water power are injured thereby. *Erkenbrecher v. Cincinnati*, 2 C. S. C. R. 412.

**Assessment for canal wall.**—Assessment for street improvements may include assessment for expense of a wall to protect the street against the waters of a canal. Such a wall need not necessarily be built under the power given the city to improve canals, but may be constructed as a necessary part of a

street improvement. *Longworth v. Cincinnati*, 34 O. S. 101.

(2) **Watercourses.**—A navigable watercourse defined. *Hickok v. Hine*, 23 O. S. 523; obstruction of a navigable stream. *Ib.*

Municipality cannot divert course of stream without compensation to riparian proprietors. *Deming v. Cleveland*, 22 C. C. 1.

See *Sprinkle v. Cleveland*, 12 C. D. 644. (General power to improve not defeated by the special act as to making of dredging contracts.)

(3) **Sewers a proper use of street.**—Sewerage is one of the legitimate uses to which the public streets and alleys of a city may be appropriated. *Cincinnati v. Penny*, 21 O. S. 499; *Elster v. Springfield*, 49 O. S. 82.

**Limitations by other sections.**—Under section such as this a council may construct a sewer, before a system of sewerage has been declared necessary and is not restricted by sections relating to construction of sewers after a system has been declared necessary. *Hartwell v. R. R. Co.*, 40 O. S. 155.

**Municipal liability.**—See note (2) under code § 77, p. 245.

(4) **Ditches.**—See § 4483 *et seq.*, p. 769.

(5) **Water closets, license fee.**—Under a general power to regulate water closets there may be some question whether a city has the power to impose a license fee. *Toledo v. Buechele*, 19 C. C. 127, 129.

Where a city is authorized to exact a license fee from vault cleaners and does so, and also requires a permit from the board of health before cleaning any vault, it is unreasonable and unlawful to exact a fee for such permit. *Ib.*

**20. [Jails, morgues, etc.]** To establish, erect, maintain and regulate jails, morgues, houses of refuge and correction, work-houses, station houses, prisons and farm schools.<sup>1</sup>

(1) **Farm school.**—For special act creating and regulating farm school in the city of Cleveland, see §§ 2112-1 to 2112-19 R. S. repealed.

**Municipal liability.**—In constructing and maintaining a work-house, a municipality acts in its governmental capacity and is not liable

for injury to prisoner caused by negligence of superintendent. *Rose v. Toledo*, 24 C. C. 540; 1 C. C. (N. S.) 321.

**Regulations.**—Officers have inherent power to make reasonable regulations for discipline. *Ib.*

**21. [Public buildings, etc.]<sup>1</sup>** To establish, erect, maintain, protect and regulate public halls, public buildings and market houses;<sup>2</sup> and by and with the consent of the abutting property owner or owners, or their lessee or lessees, to establish, maintain, protect and regulate, a market place or places, upon or on any street square or public grounds or part thereof, within the municipality; to provide for the inspection of spirits, oils, milk, breadstuffs, meats, fish, cattle, milk-cows, sheep, hogs, goats, poultry, game, vegetable and all food products.<sup>3</sup> [97 v. 508.]

(1) **Old sections.**—Section 2232 R. S. giving cities and villages power to appropriate property for markets; § 2576 R. S. giving council of any city or village power to appropriate property for, establish and regulate markets and to provide for lighting, watching and cleaning the same, and § 2577 R. S. giving council power to regulate huckstering and forestalling the market, and the sale of impure meat, enforcing its regulations by seizure of goods, etc., are all repealed by the new Code, and the entire power of municipalities with

respect to markets is expressed in the above clause of § 7, except that the power of appropriation for market places is given in the second clause of § 10. It would seem, however, that the paragraph of § 7 above is broad enough to cover all the powers given in the sections of the Revised Statutes referred to. See *Cincinnati v. Buckingham*, 10 O. 257, 261. §§ 2187 and 2230 R. S., relating to the boards which shall have the care of markets are also repealed. The supervision of markets in cities is, by the new Code given to the board of public



service. (§§ 140 and 141); and in villages, to council. (§ 204.)

(2) **Market houses.**—Dedication of space to a city for a market, gives the city a right to cover the space with a permanent building for a flower market. *Fenton v. Cheseldine*, 28 B. 223.

A city may authorize the obstruction of a street by a market house and is not liable to traveler injured by such obstruction. *Black v. Cleveland*, 3 W. L. M. 96.

A taxpayer has no right to enjoin the removal or abandonment of a market house. *Gall v. Cincinnati*, 18 O. S. 563.

Right of abutting property owner to enjoin a market as a nuisance, see *Pruden v. Cincinnati*, 1 N. P. 340.

A city cannot convert a street into a market house and rent out places on the curbstone. *Hites v. Dayton*, 6 B. 142.

The power to maintain market houses is a continuing one, and its exercise is subject to revocation by the municipality. *Gall v. Cincinnati*, 18 O. S. 563.

(3) **Market defined.**—A municipal market consists: (1) Of a place for sale of provisions and articles for daily consumption. (2) Convenient fixtures. (3) A system of police regulations fixing market hours, making provision for lighting, watching, cleaning, detecting false weights and unwholesome food and other arrangements calculated to facilitate the intercourse and insure the honesty of buyer and seller. (4) Proper officers to preserve order and enforce obedience to rules. *Cincinnati v. Buckingham*, 10 O. 257.

**Market regulations.**—*Huckstering.*—Power to regulate huckstering does not authorize council

to include in an ordinance persons as hucksters who do not fall within the ordinary meaning of that term. *Mays v. Cincinnati*, 1 O. S. 268.

*Meat selling.*—A city may prohibit selling meat on the sidewalk or street devoted to market purposes in less than certain quantities during market hours, where the city has provided a market and stall for rent at reasonable rates. *Keck vs. Cincinnati*, 37 B. 57; and city may so prohibit even though a license has been given to sell meat. *Ib.*

Ordinances regulating sale of meat, etc., in markets must be reasonable and just, when applied to the subject matter. *Kraft v. Cincinnati*, 3 N. P. 195.

One licensed to sell meat from a stand, if refused a stand in the market house may sell in the open air, regardless of a market regulation forbidding such selling. *Ib.*

*Charge for market stands.*—An ordinance imposing a charge of twenty-five cents on every person occupying a stand in the open market spaces and a fine for its non-payment to be collected by process and judgment forthwith, is valid. *Cincinnati vs. Buckingham*, 10 O. 257.

Where a city has erected a market house in a street a court will enjoin the licensing of hucksters to use the remaining portion of the street, to the injury of abutting property owners. *Wilder v. Cincinnati*, 1 N. P. 347.

**Municipal liability.**—A city is liable for injuries caused by dangerous excavation in market place, after the city has notice of the defect. *Nitz v. Toledo*, 22 C. C. 454.

It is the duty of a market superintendent to see that a market place is not rendered dangerous, and if such officer is present when danger-

ous excavation is made, the city is charged with notice. *Ib.*

A pedestrian is not a trespasser in walking on platform scales in a market place, used for many years as a part of the common thoroughfare. *Ib.*

**22. [Bath houses, libraries, etc.]** To establish, maintain and regulate public baths and bath<sup>h</sup>ouses, drinking fountains, water troughs and public toilet stations; and free public band concerts; to establish, maintain and regulate free public libraries and reading rooms, and to purchase books, papers, maps, and manuscripts therefor, and to receive donations and bequests of money or property for the same, in trust or otherwise, and to provide for the rent and compensation for the use of any existing free public libraries established and managed by a private corporation or association organized for that purpose.<sup>1</sup> [97 v. 508.]

(1) Resolution of council to maintain a free public library and provide a site for the same is authorized by the statutes relating to free public libraries. *Smith v. Evans*, 74 O. S. — (51 B. 157a).

**23. [Hospitals.]** To provide for the rent and compensation for the use of any existing free public hospital established and managed by a private corporation or association organized for that purpose.

**24. [Immoral literature.]** To restrain and prohibit the distribution, sale and exposure for sale of books, papers, pictures and periodicals or advertising matter of an obscene or immoral nature.<sup>1</sup>

(1) It was held that publishing obscene matter might be prohibited by a city under the general provisions of former § 1692 R. S., paragraph 1. *O'Brien v. Cleveland*, 1 Cleve. 100; 4 Dec. (Re.) 189.

**25. [Sewage disposal.]** To provide for the collection and disposition of sewage, garbage, ashes, animal and vegetable refuse, dead animals and animal offal and to establish, maintain and regulate plants for the disposal thereof.

**26. [Public grounds, parks and boulevards.]** To hold and improve public grounds, parks, park entrances and boulevards,<sup>1</sup>

to protect and preserve the same and to acquire by purchase, gift, devise, condemnation or otherwise and to hold real estate<sup>2</sup> or any interest therein and other property for the use of the corporation and to sell or lease the same.<sup>3</sup>

**(1) Railway through park.**— If a park is donated to a city for park purposes and forbidding all other purposes, the city has no right to grant a street railway route through it. *Cleveland Ry. v. Barriss*, 33 B. 314.

Under the general power to lay off roads and avenues through an ordinary public park, a city may authorize a street railway route to pass through the park and may reserve rent for such use of park. *Mathers v. Cincinnati*, 3 B. 551.

**(2) Purchase of real estate.**— A municipality unless restrained by statute, has the implied power to purchase and hold all such real estate as may be necessary to the proper exercise of powers specifically granted. *Avery v. U. S.*, 12 O. F. D. 175.

**Purpose of purchase.**— A municipality has no power to purchase lands to give away as an inducement for parties to locate manufacturing in the corporation. *Markley v. Mineral City*, 58 O. S. 430.

Where a city thus seeks to give property away, though its deed is of no effect, the courts will not interfere at the suit of the municipality to set the conveyance aside, but will leave the parties where it finds them. *Ib.*

A city foreclosing an assessment lien may buy in the property at sheriff's sale to save itself. *Columbus v. Schneider*, 7 N. P. 619.

A municipality cannot purchase property for the purpose of entering on a money-making business. *Hamilton v. Gas Light Co.*, 8 N. P. 319.

**Property illegally acquired.**— Property acquired by a municipality under an unauthorized contract, where restitution is impracticable, must be paid for. *Cleveland v. Denison*, 16 C. C. 541.

Property acquired by a city under an unconstitutional law, for a valuable consideration belongs to it, the transaction being wholly executed and cannot be subjected to the grantor's creditors. *Heck v. Findlay, etc., Co.*, 16 C. C. 111.

**Conditions in deed to city.**— The words "as and for a public street" in a deed to a municipal corporation do not *ex proprio vigore* import a condition. *Avery v. U. S.*, 12 O. F. D. 175.

**Acquisition by condemnation.**— See notes to § 10 of Code.

**Holding in trust.**— Municipality may take in trust devise for charitable uses. *Perin v. Carey*, 3 O. F. D. 634.

Power to hold ordinarily includes power to hold in trust. *State ex rel. v. Toledo*, 3 C. C. (N. S.) 468; 23 C. C. 327.

**What municipal property taxable.**— Lands not actually used in exercise of municipal function are taxable, although rents from them are applied to public purposes. *Cincinnati v. Lewis*, 66 O. S. 49. But see *Zumstein v. Coal & Mining Co.*, 54 O. S. 264.

**Execution against municipal property.**— Property purchased for public building purposes is exempt from execution. *Cincinnati v. Cameron*, 6 Dec. (Re) 727.

Exemptions from execution, how claimed and enforced, see *State ex rel. v. Holden*, 12 Dec. 91.

**Appropriation of municipal property.**— Property held for park purposes may be appropriated for railway right of way. *Colby v. Toledo*, 22 C. C. 732, (aff'd 68 O. S. 698), and municipality may waive jury and agree to compensation. *Ib.* Property so appropriated does not revert to original owner, but such owner is entitled to compensation. *Newton v. Manufacturers' Ry. Co.*, 14 O. F. D. 156.

**(3) Scope of power to sell.**— See notes to § 23 of Code, p. 103.



**27. [Census.]** To take and authenticate a census of the municipality.<sup>1</sup>

(1) **Census bureaus.**—This provision would seem to include the power to appoint the necessary offi-

cers, etc., to do the work here permitted.

**28. [Conductors on street cars.]** To require the employment of conductors on all street cars within the corporate limits.<sup>1</sup>

(1) **Conductors.**—Without such provision municipalities were held not to have power to require em-

ployment of conductors on street cars. *Thornhill v. Cincinnati*, 4 C. C. 354.

**29. [Penalty for violation of ordinances.]** To make the violation of ordinances a misdemeanor, and to provide for the punishment thereof by fine or imprisonment, or both; provided, that such fine shall not exceed five hundred dollars and such imprisonment shall not exceed six months.<sup>1</sup>

(1) **Old sections.**—This paragraph seems to be intended to cover the provisions of §§ 1861, 1862, 1863 R. S., which are repealed in the repealing sections of the Code. These sections outline in detail how municipalities might provide for the enforcement of ordinances by fines and penalties and what the amount of such fines and penalties might be.

For provisions relating to recovery of fines, see §§ 1864 to 1869 R. S., inclusive, in Part II.

**Right to exercise power.**—Making ordinances, though penal ones, is not the exercise of a legislative power vested solely in the Legislature. *Markle v. Akron*, 14 O. 586, 590.

**Judicial notice of ordinances.**—Municipal courts and courts reviewing their judgments will take judicial notice of ordinances in prosecutions for a violation of the

same. *Strauss v. Conneaut*, 3 C. C. (N. S.) 445; 23 C. C. 320; but state courts, in an original action, will not take such notice, although the ordinances themselves, as printed or recorded in the book of ordinances, or a certified copy of them will be received in evidence. *Toledo v. Libbie*, 19 C. C. 704; aff'd without report, 51 O. S. 562.

**Forfeitures.**—Power to impose fines, penalties and forfeitures gives no power to pass an ordinance forfeiting property without proceedings and notice. *Rosebaugh v. Saffin*, 10 O. 31.

No city has power to forfeit without legal adjudication, as a penalty for violation of an ordinance, unless the power to forfeit is specifically granted. *Cotter v. Doty*, 5 O. 393.

**Character of ordinances.**—An ordinance which contravenes the policy of the state, as declared in

general statutes is void. *Canton v. Nist*, 9 O. S. 439.

**Sunday closing.**—An ordinance prohibiting labor or requiring places of business to be closed on Sunday, which makes no exception as to work of charity or necessity, is invalid. *Canton v. Nist*, 9 O. S. 439; *Strauss v. Conneaut*, 23 C. C. 320.

**State and municipal jurisdiction to punish.**—The jurisdiction to punish under an ordinance and under a state law is concurrent.

*Wightman v. State*, 10 O. 452. But see *Wellsville v. O'Conner*, 24 C. C. 689; 1 C. C. (N. S.) 253.

**Amount of fine.**—Section 1862 R. S. provided what amount of fine would be reasonable to impose for violation of ordinances. It was held this section did not fix a limit for amount of fine, and a fine of more than fifty but not more than two hundred dollars for the first offense would not be unreasonable. *Alliance v. Joyce*, 49 O. S. 7.

30 (1).<sup>1</sup> [Licenses.] All municipal corporations shall have the power to regulate and license manufacturers and dealers in explosives; pawnbrokers; chattel mortgage and salary loan brokers; peddlers; public ball rooms, scavengers; intelligence offices; billiard rooms; bowling alleys; livery, sale and boarding stables; dancing or riding academies or schools; race courses; ball grounds, street musicians, second hand dealers and junk shops. In granting of any license a municipal corporation may exact and receive such sums of money as the council shall deem proper and expedient.

In the trial of any action brought under the power of licensing herein given, the fact that any party to such action represented himself or herself as engaged in any business or occupation, for the transaction of which a license may be required, or as the keeper, proprietor or manager of the thing for which a license may be exacted, or that such party exhibit a sign indicating such business or calling, or such proprietorship or management, shall be conclusive evidence of the liability of such party to pay the license therefor.<sup>2</sup> [Amendment, 1904, April 27, 97 v. 509.]

(1) See note under next subsection.

(2) **Licensing power.**—For further provisions relating to the li-

censing power and for annotations on this subject, see §§ 2669 R. S. to 2672 R. S. inclusive and notes p. 73, *et seq.*

**30 (2).<sup>1</sup> [Department of purchase, construction and repair.]**

To establish and furnish the necessary equipment for a municipal department to be known as the department of purchase, construction and repair. Said department shall be under the management and control of the board of public service and through it when so established and said board managing the same shall be made all purchases of material, supplies, tools, machinery and equipment, together with all construction, alterations and repairs of every kind and thing in each of the departments of the municipality whether established by law or ordinance. No purchase, construction, alteration or repair shall be made except, either upon requisition by the board or officer at the head of the department for which the same is to be made or done or upon the order of council; nor shall any purchase, construction, alteration or repair for any of said departments be made or done except on authority of council and under the laws as to competitive bidding if the cost thereof exceeds five hundred dollars. [Supplement, 1904, May 6, 97 v. 571.]

(1) **Amendments of 1904.**— Section 7 of the Code was first amended by the act of April 27, 1904, which amendment, among other changes, added sub-section 30, which is the first paragraph 30 given

above. Later, by the act of May 6, 1904, § 7 of the Code was *supplemented* by the enactment of a subsection with the same number "30," which is the second of the paragraphs numbered 30 above.

**Sec. 8. [Other powers.]** All municipal corporations shall have the powers conferred by general law in sections 2108, 2109, 2110, 2111, 2112, 2149, 2150, 2151, 2152, 2516, 2517, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2533*a*, 2669, 2669*b*, 2669*c*, 2670, 2670-1, 2671 and 2672 of the Revised Statutes of Ohio and all other acts or



parts of acts not inconsistent herewith, and having uniform operation throughout the state.

(b) PUBLIC PEACE.

**Sec. 2108 R. S. [Power of council as to public peace, etc.]**

The council of a city or village shall have power to provide for the punishment of persons disturbing the good order and quiet of the corporation, by clamor and noise in the night season, by intoxication, drunkenness, fighting, using obscene or profane language in the streets and other public places, to the annoyance of the citizens, or otherwise violating the public peace by indecent and disorderly conduct, or by lewd and lascivious behavior; and they shall have power in like manner to provide for the punishment of any vagrant, common street beggar, common prostitute, habitual disturber of the peace, known pickpocket, gambler, burglar, thief, watch-stuffer, ball-game player, a person who practices any trick, game, or device with intent to swindle, a person who abuses his family, and any suspicious person who can not give a reasonable account of himself.<sup>1</sup> [66 v. 183, § 200; (S. & C. 1554).]

(1) **Scope of power.**—Where the legislature has by general law exercised its jurisdiction as to the punishment of an offense, there is a presumption of its intention to make its jurisdiction over such subject exclusive, and the municipality cannot provide for punishment of the same offense unless the power is clearly given. *Wellsville v. O'Conner*, 24 C. C. 689; 1 C. C. (N. S.) 253.

This section does not give power to make the crime of assault and battery a municipal offense. *Ib.* See also *Cleveland v. Lovelle*, 3 O. L. R. 648; *Esch v. Elyria*, 27 C. C. 446; 7 C. C. (N. S.) 9.

An ordinance under this section, providing for the punishment of any

known thief found in the municipality, is valid, and not violative of the guarantees in the constitution. *Morgan v. Nolte*, 37 O. S. 23.

A municipality has no authority under this section to make punishable intoxication or being in a state of intoxication; but it may punish disturbance of the peace by intoxication. *Jeffries v. Defiance*, 25 B. 68.

Sections 2108, 2109, 2110 R. S. give municipalities authority to pass ordinances as to vagrancy, but the exercise of the power given by these sections was held to be optional, and a city may, if it sees fit, waive its option. *Application of Squires*, 19 C. C. 736.

**Sec. 2109 R. S. [Punishment for breaches of peace, etc.]**

Such punishment may be either by imposing and collecting fines, or by imprisonment in the proper jail or workhouse at hard labor, or both, at the discretion of the court; but no such person shall be fined for a single offense to exceed fifty dollars; and such imprisonment and hard labor shall not, for the first offense, exceed thirty days, for the second offense ninety days, for the third offense six months, and for the fourth or any further repetition of the offense one year. [66 v. 183, § 201; (S. & C. 1555).]

**Sec. 2110 R. S. [Imprisonment.]**

The council may provide that any person who refuses or neglects to pay the fine imposed on conviction of any such offense, and the costs of prosecution, shall be imprisoned and kept at hard labor until, at the rate of seventy-five cents for each day's labor, exclusive of Sundays, he shall have earned an amount equal to such fine and costs. [66 v. 183, § 202; (S. & C. 1555).]

**Sec. 2111 R. S. [Regulation as to labor.]**

The council may make suitable regulations to conduct such labor to the best advantage, and in a manner consistent with the age, sex, and health of the prisoners; and such labor may be done at the corporation prison, workhouse, or elsewhere, and under the charge of such officers or other persons as the council may select. [67 v. 75, § 203; (S. & C. 1555).]

**Sec. 2112 R. S. [Hospitals for diseased prisoners.]**

The council may provide suitable hospitals for the reception and care of such prisoners as may be diseased or disabled; the same to be under such regulations, and under the charge of such persons, as the council may direct. [66 v. 183, § 204; (S. & C. 1555).]

(c) NUISANCES.

**Sec. 2149 R. S. [Powers of municipal corporations to fill lots, remove obstructions, etc.]**

All municipal corporations shall have power to cause any lot of land within their limits on which water at any time becomes stagnant, to be filled up or drained, and to cause all putrid substances to be removed from any lot, and to cause the removal of all obstructions from all culverts or covered drains on private property, laid in any natural water-course, creek, brook or branch where the same obstructs the water naturally flowing therein, causing it to flow back or become stagnant, in a way prejudicial to the health, comfort, or convenience of any of the citizens of the neighborhood;<sup>1</sup> and if such culverts or drains be of insufficient capacity, to cause the same to be made of such capacity as reasonably to accommodate

the flow of such water at all times therein; and the council may direct, by resolution,<sup>2</sup> the owner to fill up or drain such lot, remove such putrid substance, or remove such obstructions, and if necessary enlarge such culverts or covered drains to meet the requirements thereof. [1884, March 11: 81 v. 37; Rev. Stat. 1880; 66 v. 225, § 452.]

(1) **Scope of power.**—A city council cannot arbitrarily declare a stream a nuisance and order it abated. The power to abate nuisances in any way the corporation deems expedient is not an unrestricted power. The abatement must be necessary for the public good and limited by necessity, and no wanton injury to property must be committed. *Deming v. Cleveland*, 22 C. C. 7, 9.

(2) **Validity of resolution directing lots to be filed.**—A resolution under the Act of 1852, similar to this, directing lot owners to fill and drain their lots in such manner as should be necessary to remove all stagnant water, was held to be constitutional as a reasonable sanitary

measure. *Bliss v. Kraus*, 16 O. S. 54.

**Scope of such resolution.**—By reasonable construction of such resolution it required not merely the removal of stagnant water, but that the work be done in such a way as to prevent the recurrence of stagnant water. *Bliss v. Kraus*, 16 O. S. 54.

**Description of premises.**—Where the property described in the resolution for the abatement of a nuisance identifies the premises, a misnomer of the township will not invalidate the proceedings. *Poland v. Connolly*, 16 O. S. 64.

See generally note to paragraph 3, § 7, of the Code.

#### FORM OF RESOLUTION DIRECTING OWNERS OF LOTS TO FILL AND DRAIN THE SAME.

Be it resolved by the council of the city [or village] of . . . . ., State of Ohio:

That the owners of the following lots, to wit:— (insert description of property required to be filled and drained) be and they are hereby directed to fill and drain said lots so as to remove therefrom all stagnant water.

That such owners be required to comply with the direction herein given within two weeks from the receipt of notice hereof or the publication of the same as herein directed, and that if the same shall not be done by that time the corporation will do the work at its own expense and collect the amount thereof from such owners in the manner provided by law.

The city [or village] clerk is hereby directed to serve a copy of this resolution upon the owners of such lots or on their agents or attorneys and publish the same for two consecutive weeks in . . . . . a newspaper of general circulation in the corporation.

Adopted the . . . . . day of . . . . ., 19 . . . . .

Attest:

.....  
Clerk.

.....  
President of Council.



If it is desired to direct putrid substances to be removed, obstruction to water courses to be removed, culverts to be enlarged, etc., in accordance with the above section, the form given above may be changed to meet requirements.

**Sec. 2150 R. S. [Duty of owner to comply with direction.]**

It shall be the duty of such owner, or his agent or attorney, after service of a copy of such resolution, or after a publication of the same in some newspaper of general circulation in such corporation for two consecutive weeks, to comply with the directions of the resolution within the time therein specified. [66 v. 225, § 453.]

**Sec. 2151 R. S. [To be done at owner's expense, in case of refusal or neglect, etc.]** In case of failure or refusal to comply with the resolution, the work required thereby may be done at the expense of the corporation, and the amount of money so expended shall be recovered from the owner before a justice of the peace, or other court of competent jurisdiction; and such expense shall, from the time of the adoption of the resolution, be a lien on such lot, which may be enforced by suit in the Court of Common Pleas of the proper county; and like proceedings may be had as directed in relation to the improvement of streets. [66 v. 225, § 454.]

**Sec. 2152 R. S. [Duty of health officers to enforce provisions of this chapter.]** It shall be the duty of the officers connected with the health department of every such municipal corporation, to see that the provisions of this chapter are strictly and promptly enforced.

(d) CEMETERIES.

**Sec. 2516 R. S. [Council to provide cemeteries.]** The council may provide places for the interment of the dead outside of the corporate limits, and the police powers of the corporation shall extend to those places. [66 v. 210, § 361.]

**Sec. 2517 R. S. [Title to be vested in corporation.]** The title to, and right of possession of all public graveyards and burial-grounds, located within any city or village, which have been set apart and dedicated as public graveyards or burial-grounds, and grounds which have been used as such by the public, but not dedicated, except such as may be owned or under the care of any religious or benevolent society, or any incorporated company or association, shall be and the same are hereby vested in the corporation where such public graveyard or burial-ground is located. [66 v. 210, § 362.]

**Sec. 2521 R. S. [Duties of trustees.]** The trustees<sup>1</sup> shall take possession and charge, and have the entire management, control, and regulation of all public graveyards, burial-grounds, and cemeteries located in or belonging to the corporation, subject to its ordinances, and they shall direct, whenever they may deem it necessary, the laying out of such grounds and cemeteries into lots, avenues, walks, and paths, or other subdivisions, which lots shall be numbered, the avenues named, and a plat thereof made so as to exhibit a fair and distinct outline of the grounds; and the same shall be kept in the office of the clerk of the corporation for the use of the public. [66 v. 211, § 366.]

(1) **Managing board.**—*In cities.*—The sections (2518–2520 R. S.) providing for the election of boards of trustees of cemeteries, their terms of office, etc., were repealed by the Code. By § 141 of the Code, the Board of Public Service is given charge of cemeteries in cities. The duties, powers, etc., here, and in subsequent re-enacted sections, would therefore devolve upon the Board of Public Service.

*In villages.*—In villages the care of cemeteries is no doubt reposed in council, since under paragraph 17 of § 7 of the Code, the power is given to all municipalities to establish and regulate cemeteries. In those

villages having trustees of public affairs, as authorized in § 205 of the Code, such trustees may have imposed upon them by ordinance the control and management of cemeteries. This is authorized by the provision in § 205 giving to the trustees of public affairs “such other duties as may be prescribed by law or ordinance, not inconsistent herewith.”

By § 2518 R. S. re-enacted May 3, 1904, the mayor in villages is given power to appoint cemetery trustees, where there are public cemeteries already or hereafter to be established. See § 2518 in Part II. (page 731).

**Sec. 2522 R. S. [Their power, etc.]** The trustees<sup>1</sup> shall direct all the improvements and embellishments of the grounds and lots, protect and preserve the same, and appoint, subject to the approval of the council, all necessary superintendents, employes, and agents, and determine their term of office and the amount of their compensation.<sup>2</sup> [66 v. 211, § 367.]

(1) See note to § 2521 R. S., *supra*.

(2) **Bids for work.**—It is not necessary that bids be advertised for and received for the work and materials used, in the improvements and embellishments here authorized. See *Walsh v. Columbus*, 36 O. S. 169.

**Municipal liability.**—A city is liable for injuries to an employee while engaged in improving a vault owned by the city in its cemetery, such injury occurring through the negligence of the superintendent of the cemetery and the board having control and management of it. *Toledo v. Cone*, 41 O. S. 149.

**Sec. 2523 R. S. [May institute suits, etc.]** The trustees<sup>1</sup> shall, when necessary, institute suits in the name of the corporation to recover the possession of such grounds, remove trespassers therefrom, and recover damages for injuries thereto, or to any tombstone or monument therein, and they shall see that all laws and ordinances passed for the protection of public burial-grounds and cemeteries, and the burial of the dead, are enforced. [66 v. 211, § 368.]

(1) See note to § 2521 R. S., *supra*.

**Sec. 2524 R. S. [To make by-laws, etc.]** The trustees<sup>1</sup> shall make such by-laws and regulations, not inconsistent with the ordinances of the corporation and the constitution and laws of the state, as they deem useful and necessary for the management and protection of such burial-grounds and cemeteries as may be under their control, and the burial of the dead therein, which by-laws and regulations shall have the same validity as the ordinances of the corporation; and they shall perform all such other duties pertaining to their office as the council may, by ordinance, prescribe. [66 v. 211, § 369.]

(1) See note to § 2521 R. S., *supra*.

**Sec. 2525 R. S. [Shall fix price of lots and term of payment.]** The trustees<sup>1</sup> shall determine the size and price of lots, and terms of payment therefor, and shall give to each purchaser a receipt, showing the amount paid and a pertinent description of the lot or lots sold; and upon producing such receipt to the proper officer, the purchaser shall be entitled to a deed for the lot or lots described therein. [66 v. 211, § 370.]

(1) See note to § 2521 R. S., *supra*.

**Sec. 2526 R. S. [Charge for cemetery lots limited.]** No more shall be charged for lots than shall be necessary to reimburse the corporation for the costs of lands purchased or appropriated for cemetery purposes, and to keep in order and embellish the grounds; and provision shall be made for the interment in such cemetery of all persons buried at the expense of the corporation. [68 v. 130, § 371.]

**Sec. 2527 R. S. [Sale of lots, laying off and embellishing of grounds; donations; appointment of managing trustee; notice of appointment.]** The trustees<sup>1</sup> shall have the entire charge and control of the receipts arising from the sale of lots, and of the laying off and embellishing the grounds. They may receive donations by bequest, devise, or deed of gift, or otherwise, or



money, or other property; the principal or interest of which [is] to be used for the enlargement, improvement, embellishment, or care of the cemetery grounds generally, or for the embellishment, care or improvement of any particular part or parts, lot or lots therein, as the donor may direct, or as the trustees may from time to time determine, if no direction is given. And they shall appoint one of their number to sell lots, receive payment therefor, direct the improvements, and make the expenditures, under such rules and orders as they shall prescribe, and to invest, manage, and control all property received by donations and all surplus funds in their hands from any source whatever. Notice of such appointment shall, upon being made, be communicated to the council. [1887, March 16: 84 v. 84; Rev. Stat. 1880; 66 v. 211, § 372.]

(1) See note to § 2521 R. S., *supra*.

**Sec. 2527a R. S. [Permanent fund authorized for care of lots.]**

It shall be the duty of the trustees<sup>1</sup> of cemeteries, the title of which is, by law, vested in a city or village of this state, to declare in their by-laws and regulations for the management of such cemeteries, the amount of money they will accept by agreement, gift, devise, bequest or otherwise and hold as a permanent fund of such cemetery; and that they will pledge the faith [and credit] of such city or village, for the perpetual care of such lot or lots designated, using only the interest or income of such money. And such trustees of cemeteries shall, and they are hereby authorized, on the receipt of such said sum of money they designate, to issue therefor a written receipt and acknowledgment of the same, signed by their president and clerk therefor, and bind the faith and credit of such corporation, holding the title to such cemetery, to forever hold said money as a permanent fund, and to provide perpetual care of the lot or lots therein named, for the use, income or interest of such money. And such said trustees shall, by resolution, enter, on the minutes of their proceedings, full detail of such obligation; and shall enter the receipt and incomes of said money and the expenditure thereof in detail on their books of accounts, keeping each case separately.

Such trustees of cemeteries shall, on the passage of this act, turn over to the council of the municipal corporation, holding title to such cemetery, all property now on hand or held by them as a permanent fund, for the perpetual care of lots in cemeteries under their control, or such money as may thereafter come to them for such purpose, rendering a full statement thereof, by

whom paid, when, and for what purpose; and on the receipt thereof such council shall acknowledge the receipt thereof in writing to said trustees signed by its clerk, and by resolution duly passed and entered on the minutes of its proceedings, wherein, such council shall pledge the faith and credit of the corporation, it represents, to forever hold such money as a permanent fund, and pay in semi-annual payments, to the trustees of such cemetery, as interest on said funds, sufficient to provide perpetual care of such lot and lots as agreed by such trustees, and such council and its successors shall invest and keep invested all of said funds in any interest bearing debts of said city or village, if any, and if no such debts are owing by such city or village, such money shall be invested in safe interest bearing bonds, or stock for the benefit of such cemetery funds, that the same may bear as great an income as possible, and all such money and the income thereof shall be exempt from taxation, the same as other cemetery property.<sup>2</sup> [May 10, 1902, 95 v. 543.]

(1) See note to § 2521 R. S., *supra*.

(2) This section was passed May 10, 1902, as a supplement to § 2527, and under §212 of the Code, it is to

be considered as re-enacted, though not mentioned in the list of re-enacted sections given in above § 8 of the Code.

**Sec. 2528 R. S. [Clerk, and quarterly report.]** The trustees<sup>1</sup> shall appoint a clerk, and keep accurate minutes of all their proceedings, and report quarterly to the council all the moneys received and disbursed by them as such trustees. [66 v. 211, § 373.]

(1) See note to § 2521 R. S., *supra*.

**Sec. 2529 R. S. [Annual report to council.]** The trustees<sup>1</sup> shall, annually, on the first Monday of April, or as soon thereafter as may be practicable, report in writing to the council, the number of lots sold, to whom sold, and the amount received therefor, during the year preceding, and a detailed statement of the expenditures during the same period, showing the time and purpose of each payment, and to whom made. [66 v. 212, § 374.]

(1) See note to § 2521 R. S., *supra*.

**Sec. 2530 R. S. [Statement as to funds, etc.]** Such report shall also contain a pertinent statement whether the funds, if any on hand, are invested, and the character of the securities there-

for, and such other matters as the trustees<sup>1</sup> may deem expedient or the council may require. [66 v. 212, § 375.]

(1) See note to § 2521 R. S., *supra*.

**Sec. 2531 R. S. [Enlargement of grounds.]** When, in their judgment, an enlargement of any burial or cemetery grounds has become necessary, or grounds for additional cemeteries should be provided, the trustees<sup>1</sup> shall report the fact to the council, and recommend such action as they may deem most expedient. [66 v. 212, § 376.]

(1) See note to § 2521 R. S., *supra*.

**Sec. 2532 R. S. [Union of cities, etc., and townships for cemetery purposes.]** It shall be lawful for the councils of two or more municipal corporations, or of such corporation or corporations, and the trustees of any township or townships, when conveniently located for that purpose, to unite in the establishment and management of a cemetery, by the purchase or appropriation of land therefor, not exceeding in extent one hundred acres, to be paid for as hereinafter provided. [66 v. 212, § 377; 68 v. 73, § 1.]

**Sec. 2533 R. S. [Election of trustees in case of union.]** When two such bodies unite for cemetery purposes as provided in the preceding section, the municipal corporation or township having the larger number of voters at the last preceding annual election for corporation or township officers, shall elect two trustees, one trustee for one year and one trustee for two years, and the other corporation or township shall elect one trustee for three years, and that at the expiration of their respective terms their successors shall be elected for a term of three years. When three such bodies unite for such purposes each of such corporations or townships shall be entitled to one trustee, and when four or more such bodies unite for such purposes, the three corporations or townships having the largest number of voters respectively shall each elect one trustee, and at the next annual election the corporation or township, the term of whose trustee expires, shall not be entitled to a trustee, but the corporation or township standing fourth in the number of voters shall be entitled to a trustee, and so on in rotation, so that each corporation or township shall be without a trustee at regular intervals corresponding with the number of corporations or townships that may be united in the provisions of this chapter, and all vacancies in said board shall be filled by the council of such corporation or corporations and the trustees of such township in joint session convened for that purpose.<sup>1</sup> [97 v. 387; 68 v. 73, § 2.]



(1) **Joint cemetery board.**— §§ 2533 and 2533a R. S., in providing for the management of cemeteries jointly owned by townships and municipal corporations, are inconsistent with the provisions of the new Code giving to the directors of public service in cities and councils in villages the control of cemeteries. (See note to § 2521 R. S., *supra*). The control of cemeteries so given must include those owned jointly with a township as well as those owned exclusively by a municipal corporation. Otherwise power would be given to a particular class of municipalities, to wit, those whose cemeteries are owned jointly with a township, to create a special board

for the management of such properties in a manner different from all other municipalities, producing a result not in harmony with the general purpose of the new Code. To give effect, therefore, to the reenactment of §§ 2533 and 2533a, the directors of public service in cities and the council (or trustees of public affairs or trustees appointed under § 2518) in villages, would represent their municipalities in the management of cemeteries owned jointly with a township as above, and their vote or votes in such joint management would be in the proportion given and under the rules governing in said sections.

**Sec. 2533a R. S. [Organization of board of trustees.]** The board of trustees, when appointed in pursuance with the provisions of Section No. 2533 shall organize by electing a president, a secretary and a managing trustee, the latter of whom shall receive and hold all moneys coming into the hands of such board. Before entering upon the discharge of his duties, the managing trustee shall give bond, with sureties to be approved by the president and secretary of such board of trustees, payable to them as such officers in such sum as they determine, and conditioned for the faithful discharge of his duties, and the paying over according to law upon the order of the board, of all moneys that may come into his hands by virtue of his office.<sup>1</sup> [89 v. 177.]

(1) See note to § 2533 R. S., *supra*.

(e) LICENSES.

**Sec. 2669 R. S. [General licensing powers of council.]** The council of any city or village may provide by ordinance for licensing all exhibitors of shows or performances of any kind, not prohibited by law, hawkers, peddlers, auctioneers of horses and other animals on the highways or public grounds of the corporation, vendors of gunpowder and other explosives, taverns and houses of public entertainment, and hucksters in the public streets or markets, and, in granting such license, may exact and receive such sum of money as it may think reasonable;<sup>1</sup> but nothing in this section shall be construed to authorize any municipal corporation to require of the owner of any

product of his own raising, or the manufacturer<sup>2</sup> of any article manufactured by him, license to vend or sell in any way, by himself or agent, any such article or product; provided, that in cities and villages, the council may confer upon, vest in and delegate to the mayor of such city or village, the authority to grant and issue licenses and revoke the same. Provided further, that nothing herein contained shall be construed to limit the power conferred upon cities and villages in section *one thousand six hundred and ninety-two*<sup>3</sup> of said Revised Statutes. [1889, March 28: 86 v. 164; 82 v. 148; 77 v. 74; Rev. Stat. 1880; 66 v. 223, § 447; 76 v. 167, § 1.]

(1) **Definition of a license.**— State *ex rel.* v. Hipp, 38 O. S. 199.

**Constitutionality.**—It is within the power of the legislature to authorize municipalities to impose a charge for licensing. Though the constitution does not expressly confer such power, it is not prohibited and may be exercised. Baker v. Cincinnati, 11 O. S. 534.

A license fee exacted from exhibitors and others, though a substantial amount, does not violate the constitutional requirement of uniformity of taxation, nor the rule requiring a tax to be according to the true value in money. Baker v. Cincinnati, 11 O. S. 534; and see Marmet v. State, 45 O. S. 63, and Cincinnati v. Bryson, 15 O. S. 625.

**Subjects of licensing power.**—A town ordinance prohibiting the keeping of a grocery without a license, is valid, though it enumerates articles licensed, to be sold, for state or county purposes. Thomas v. Mt. Vernon, 9 O. 290.

Council would have power to license and regulate draymen. Cincinnati v. Bryson, 15 O. 625.

Hawking and peddling are proper subjects for police surveillance and may be licensed, if done without discrimination and a reasonable license fee charged.

But council cannot by ordinance include persons as hucksters who do not fall within the ordinary meaning of that word. Mays v. Cincinnati, 1 O. S. 268.

License cannot be exacted from ticket brokers under the general provisions of this section. The power to license such brokers must be specifically given. Frank v. Cincinnati, 7 N. P. 146. But such license would be allowed under the provisions of § 7, clause 7, of the Code.

**Exhibitor of show — Who is.**—An ordinance forbidding persons to exhibit or participate in exhibiting a performance without license, applies to proprietors and not to performers. *Ex parte* Ryan 7 B. 50.

**Auctioneer — Who is.**—Criers of tobacco at warehouse sales are auctioneers within a section such as this. State v. Withers, 3 N. P. 63.

**Reasonableness of charge.**—A city ordinance imposing a fine of \$25 per day for auctioning goods brought into the city for the purpose is an unreasonable exercise of power. Sipe v. Murphy, 49 O. S. 536.

An ordinance fixing a charge of 25 cents a day for occupying a stand in market was held good. Cincinnati v. Buckingham, 10 O. 257.

A license fee of \$50 per day imposed on transient dealers was held

unreasonable. *Glaser v. Cincinnati*, 31 B. 243.

An ordinance charging \$20 per day as a license fee for selling goods imported into the municipality for sale and for advertising bankrupt, receivers', etc., sales would be unreasonable. *Newark v. Flatau*, 34 B. 239. (Supreme Ct. not reported.) See also *Flatau v. Mansfield*, 14 C. C. 592, 597.

To hold ordinance invalid because fee is excessive, the fee must be manifestly unreasonable and oppressive. Fee of \$50.00 a year for certain persons selling goods upon the streets held reasonable. *Murphy v. Columbus*, 15 Dec. 60; 2 N. P. (N. S.) 484.

**Licensing power cannot be used to tax an employment.**—

The power of taxation is a sovereign power and can be exercised only when expressly granted. The power to tax employments, not being conferred on municipalities, they cannot exercise it, as a means of preventing the employment, or otherwise.

The sum demanded for license to pursue an employment, when used as a means of supplying the public treasury, is a tax upon such an employment, and not strictly a license. Such a tax a municipality has no power to levy. *Mays v. Cincinnati*, 1 O. S. 268.

When the sum demanded is, however, "rather a price received for accommodations provided by the public," it is strictly a license fee. *Cincinnati v. Buckingham*, 10 O. 257.

Requiring the fees to be paid into the street repair fund, does not show conclusively that ordinance is for purpose of raising revenue, and not a price received for accommodations provided by the public. *Murphy v. Columbus*, 15 Dec. 60; 2 N. P. (N. S.) 484.

The burden imposed on officials may justify a license fee beyond the mere expense of filling up the blanks. *Baker v. Cincinnati*, 11 O. S. 534, 543; *Columbus v. Jeffrey*, 1 N. P. (N. S.) 265; 13 Dec. 639; and the fact that some revenue is derived from a license does not make the ordinance invalid. *Ib.*; and the presumption is that the fee does not exceed the expense of regulation, un-

less the contrary plainly appears. *Ib.*; *Cincinnati v. Bryson*, 15 Ohio 625; *Columbus v. Jeffrey*, 16 Dec. 330. So an ordinance, exacting a license fee for theatrical exhibitions for six months and also a fee for the officer issuing the license, was upheld. *Baker v. Cincinnati*, 11 O. S. 534.

**Discrimination.**—*Against goods made outside of state.*—An ordinance, under this section, requiring hawkers and peddlers to pay a license, in so far as it is applicable to goods made outside the state is void as a regulation of commerce, and a dealer compelled to pay may recover back license fee. *Burkhart v. Columbus*, 17 B. 342. See also *In re Julius*, 26 C. C. 423; 4 C. C. (N. S.) 604.

The power to license auctioneers cannot be used to discriminate between sales of goods of the same class already in the city and those imported into it. *Sipe v. Murphy*, 49 O. S. 536.

A city cannot discriminate against articles made outside the state, and an ordinance requiring canvassers for their sale to pay a license is void. *Ex parte Clamp*, 16 B. 229.

License to sell goods is in legal effect a tax upon such goods, so that if a license to sell goods applies to goods made outside the state and discriminates against them, it is void as a regulation of interstate commerce. *Arnold v. Yanders*, 56 O. S. 417, 420.

*As between different persons in municipality.*—An ordinance is not invalid because it requires different fees of persons using one kind of vehicle from those required of persons using another kind, if the graduation of fees is reasonable. *Murphy v. Columbus*, 15 Dec. 60; 2 N. P. (N. S.) 484.

*Against persons living outside of municipality.*—An ordinance requiring a license for selling goods from such persons only as do not live in the municipality is void. *Radebaugh v. Plain City*, 28 B. 107.

**Character and effect of license ordinances.**—An ordinance requiring license for all vehicles using the streets, is applicable to non-residents transporting articles between



two states and is not void as a regulation of interstate commerce. *Bogart v. State*, 20 B. 458.

An ordinance, under legislative act requiring license fee for each vehicle using the streets, the fee being graded according to the number of horses used, is constitutional. *Marmet v. State*, 45 O. S. 63.

A license having been given to sell meat from a stand, the licensee, if refused a stand in the market-house, may sell in the open air, regardless of a prohibition in the market regulations against such selling. *Kraft v. Cincinnati*, 3 N. P. 195, 6 O. D. 8.

Ordinance must be reasonable and not tending to foster a monopoly. *Id.*

Forbidding retail of meat on sidewalk or in the street outside the market-house on market days is a reasonable and valid ordinance. Having issued a license to defendant to sell meat does not surrender the right to regulate. *Keck v. Cincinnati*, 6 O. D. 97; 37 B. 57, edit.

An ordinance limiting statutory rights is void. *State v. Tooker*, 5 N. P. 122.

**Enforcement.**—Ordinance may provide that payment of license fee be compellable by fine. *Marmet v. State*, 45 O. S. 63.

Where no other remedy for collecting a license fee is provided, the municipality may collect by civil action. *Cincinnati v. Beuhausen*, 22 B. 421.

Authorities of a municipality may arrest a proprietor of a variety show who exhibits without a license, but cannot close the place or abate the business under § 2669. *Ryan v. Jacob*, 6 B. 139.

Payment of license fee for occupying market stand may be enforced by a fine imposed in a sum-

mary process before the mayor. *Cincinnati v. Buckingham*, 10 O. 257.

Under a license law requiring a license for wagons, etc., using the streets, the person driving is not liable for punishment, if he did not own the vehicle or have any interest therein. *O'Rourke v. State*, 6 C. C. 612.

### **Recovery of illegal license fee.**

—*Involuntary payment.*—When a license fee, though illegal, has been voluntarily paid, upon the party's own petition and without protest, it cannot be recovered back. *Mays v. Cincinnati*, 1 O. S. 268.

As to what is a voluntary payment to the officer issuing the license, see *Mays v. Cincinnati*, 268; *Baker v. Cincinnati*, 11 O. S. 534; *Stephan v. Daniels*, 27 O. S. 527, 539; *Toledo v. Buechele*, 19 C. C. 127 (affirmed, without report, 65 O. S. 603).

In *Toledo v. Buechele*, 19 C. C. 127, the rule as to involuntary payments is thus laid down: "The money will be deemed to be paid involuntarily, and may be recovered back, where the position or interests of the party paying it were such as to require from another the performance of a duty enjoined by law, and the party paying it, was illegally compelled to pay the money to induce the other to perform such duty for him."

One who disputes the amount of a license should tender a reasonable amount, or pay and sue to recover the amount paid on any excess over the right amount. *Cincinnati v. Bryson*, 15 O. 625; *ex parte Ryan*, 7 B. 50.

*Limitation for recovery.*—Recovery of license fee illegally exacted is not limited to one year. It does not come within § 5848 R. S.

Toledo v. Buechele, 19 C. C. 127 (aff'd. without rep., 65 O. S. 603).

**Revocation.**—A license to conduct concert hall cannot be revoked by the mayor on mere complaint that the hall is disorderly. *Smith v. Major*, 16 C. C. 362.

**Delegation of power by council.**—Power granted to council by the legislature, except ministerial powers, cannot be delegated. The power to fix the standard of competency of applicants for license as stationary engineers is not merely ministerial or executive power, but involves discretion and, under a statute to provide for licensing engineers, cannot be delegated by council to inspectors. *Hengst v. Cincinnati*, 7 N. P. 1.

**Validity of ordinances.**—This section by express words permits council to delegate the power to license to the mayor. But if this is not so, an ordinance against unlicensed performances will not be held void when a person can pay and recover back if license fee has been exacted wrongfully. *Ex parte Ryan*, 7 B. 50.

Ordinance not invalid because the city treasurer and not the mayor authorized to issue licenses. *Murphy v. Columbus*, 15 Dec. 60; 2 N. P. (N. S.) 484.

(2) **Manufacturer—Who is.**—One who buys cattle and converts them into roasts, steaks, etc., is not a manufacturer under this section. *Tippecanoe v. Boercher*, 5 C. C. 6.

A tailor soliciting orders for suits of clothes and making and delivering suits is a manufacturer within meaning of this section and cannot be required to pay a license as a

peddler. *Radebaugh v. Plain City*, 28 B. 107.

**Fee for permits.**—An ordinance relating to the sale of pure milk in a city and requiring inspection of milk sold, required a fee of one dollar to be paid and a tag attached to each wagon used in selling milk, before a permit to sell in the city would be granted. It was held that the mere fact that the fee was charged and tag required did not constitute the permit a license in violation of this clause of § 2669, exempting vendors of their own products from payment of a license. Such permit is a mere step to secure enforcement of the object of the ordinance, viz., the sale of pure milk, and to enable the purchaser to rely on the fact that the requirement of the board of health has been complied with. *Walton v. Toledo*, 3 C. C. (N. S.) 295; 23 C. C. 547, (aff'd 69 O. S. 548).

**Validity of limitation**, as to persons selling their own produce, see *Columbus v. Jeffrey*, 16 Dec. 330.

**Health regulations.**—An ordinance which is exclusively a health regulation, under the power given in former § 1692 R. S. would not be affected by this clause, excepting vendors of their own products from payment of license, even if such ordinance should provide for licenses, since § 2669 is expressly declared not to be intended to limit § 1692. *Walton v. Toledo*, 23 C. C. 547, 3 C. C. (N. S.) 295 (aff'd 69 O. S. 548).

(3) Section 1692 here referred to is repealed by the Code. Its provisions are substantially retained, however, in § 7 of the Code.

**Sec. 2669b R. S. [Further licensing powers of council.]** The council of any village or city may provide by ordinance for licensing bill-posters, transient dealers, persons who temporarily open stores or places for the sale of goods, wares, or merchandise, and all persons who shall, on the street, or traveling from place to place about such village or cities, sell, bargain to sell, or solicit orders for goods, wares or merchandise by

retail. The granting of such license shall be controlled by the provisions of section 2669.<sup>1</sup> [90 v. 311.]

(1) See notes to § 2669, *supra*.

**Constitutionality.**—A provision in an ordinance requiring transient dealers to take out a license before selling goods in the corporation, if standing alone, would be unconstitutional. *Flatau v. Mansfield*, 14 C. C. 592. An ordinance which discriminates in favor of persons who form a purpose to sell *after* coming into municipality and against those who come temporarily

*with* the purpose, is unreasonable. *Brunner v. Harrison*, 1 C. C. (N. S.) 111; 25 C. C. 247. An ordinance requiring a license fee from agents of portrait companies of another state for the privilege of canvassing for orders for pictures to be manufactured by such companies in such foreign state, is void, as a regulation of interstate commerce. *In re Julius*, 26 C. C. 423; 4 C. C. (N. S.) 604.

**Sec. 2669c R. S. [Licensing of advertising mediums and matters.]** That the council of any city or village may provide by ordinance for licensing bill-posters, advertising sign-painters, bill-distributers, card-tackers, and advertising matter of any article or compound which has not been manufactured or compounded within the corporation limits of such municipality.<sup>1</sup> In granting such license said council may exact and receive such sums of money as it may think expedient, and may delegate to the mayor of such city the authority to grant and issue such license and revoke the same. Providing, that nothing in this section shall be construed to authorize the council of any city or village to exact and receive a license fee from merchants doing business in such city or village, for advertising their own business. [91 v. 362.]

(1) See *Flatau v. Mansfield*, 14 C. C. 592, 597, and note to § 2670-1, *infra*.

**Bill posters.**—Constitutionality of license, see *Angove v. State*, 8 N. P. 514.

**Sec. 2670 R. S. [Licensing of vehicles, undertakers, etc.]** The council may also license the owners of vehicles used for the transportation of persons or property, for hire, and all undertakers and owners of hearses; but the owner of any such vehicle may be made liable for the breach of any ordinance regulating the conduct of the drivers thereof. [66 v. 224, § 448.]

**Sec. 2670—1 R. S. [Licensing of transient dealers.]** That the council of any city or village may provide by ordinance for licensing transient dealers or persons who open stores or places for the temporary sale of goods, wares or merchandise, and in granting such license may exact and receive such sum of money as it may think expedient, and may delegate to the mayor of such city or village the authority to grant and issue such licenses and revoke the same; provided, that this act shall not apply



to persons selling by sample only, nor to any agricultural articles or products offered or exposed for sale by the producer.<sup>1</sup> [87 v. 100; 86 v. 244.]

(1) **Constitutionality.** — This act violates §§ 1 and 2 of the bill of rights and is invalid. *Flatau v. Mansfield*, 14 C. C. 592.

An ordinance under such act would also be invalid because par-

tial, and unjustly discriminating between goods in the municipality and goods brought in for purpose of sale. *Id.*; *Newark v. Flatau*, 34 B. 239.

**Sec. 2671 R. S.** [Council may prescribe width of tires, fix rate of transportation, etc.] The council may prescribe the width of the tires of all wagons, carts, drays, and other vehicles used in the transportation of persons from one part of the corporation to another, or in the transportation of coal, wood, stone, lumber, iron, or other articles in the corporation; and establish[ed] stands<sup>1</sup> for hackney coaches, cabs, or omnibuses, enforce the observance and use thereof, and fix the rates and prices for the transportation of persons and property in such coaches or other vehicles from one part of the corporation [transportation] to another. [66 v. 222, § 441.]

(1) **Hack stand in front of stores** on side of street would be a nuisance, and an ordinance establishing such stand would be invalid. See *Branahan v. Hotel Co.*, 39 O. S. 333.

**Section strictly construed.**— This section must be strictly construed. *Hotel Co. v. Branahan*, 7 B. 57.

**Sec. 2672 R. S.** [License, regulation, etc., of ferries.] The council of any city or village shall have the exclusive power to establish, regulate, and license ferries, from such corporation, or any landing therein, to the opposite shore, or from one part of the corporation to another; and in granting such license to impose such reasonable terms and restrictions, in relation to the keeping of such ferries, and the time, manner, and rates of the carriage and transportation of persons and property, as may be proper; and to provide for the revocation of any such license, and for the punishment by proper fines and penalties, of the violation of any ordinance prohibiting unlicensed ferries, or regulating those established and licensed. [66 v. 223, § 446.]

## 2. SPECIAL POWERS.

§ 9. [Special power of municipalities.] All municipal corporations shall have the following special powers,<sup>1</sup> which shall be exercised in the manner hereinafter provided:

First. To appropriate property for public purposes.

Second. To sell or lease public property.

Third. To regulate the use of streets.

Fourth. To levy and collect taxes.

Fifth. To levy and collect special assessments.

Sixth. To borrow money.

Seventh. To maintain and protect a sinking fund.

(1) **Similar grants elsewhere.** — Some of the special powers given here are included also in the list of general powers in § 7 of the Code. This is true to some extent of the power to sell and lease and to appropriate property (§ 7, paragraph 26) and of the power to open and repair streets. (§ 7, paragraph 18.)

In so far as the powers granted in the list of general powers are granted also in the list of special powers, and their manner of exercise specified, the powers are limited by the provisions of this section and must be exercised as herein provided. See *Gas Co. v. Tiffin*, 59 O. S. 420, 441; *Doll v. Barr*, 58 O. S. 113, 120.

FIRST. APPROPRIATION OF PROPERTY.<sup>1</sup>

§ 10. [Appropriation of property.] All municipal corporations shall have power to appropriate, enter upon and hold, real estate within their corporate limits for the following purposes:<sup>2</sup>

1st. For opening, widening, straightening, changing the grade<sup>3</sup> of and extending streets and all other public places, and for this purpose the corporation may appropriate the right of way across railway tracks and lands held by railway companies where such appropriation will not unnecessarily interfere with the reasonable use of the property so crossed by such improvement;<sup>4</sup> and for obtaining material for the improvement of streets and other public places.

2nd. For parks, park entrances, boulevards, market places and children's playgrounds.<sup>5</sup>

3rd. For public halls and offices, and for all buildings and structures required for the use of any department.<sup>6</sup>

4th. For prisons, workhouses, houses of refuge and correction, and farm schools.<sup>7</sup>

5th. For hospitals, pest-houses, reformatories, crematories and cemeteries.<sup>8</sup>

6th. For levees, wharves and landings.<sup>9</sup>

7th. For bridges, aqueducts, viaducts and approaches thereto.

8th. For libraries, university sites and grounds for the same.

9th. For constructing, opening, excavating, improving or extending any canal, or watercourse, located in whole or in part within the limits of the corporation, or adjacent and contiguous thereto, and which is not owned in whole or in part by the state, or by a company or individual authorized by law to make such improvements.<sup>10</sup>

10th. For sewers, drains, ditches, public urinals, bath-houses, water closets, and sewage and garbage disposal plants and farms.<sup>11</sup>

11th. For waterworks, natural and artificial gas, and electric lighting, heating and power plants, and for supplying the products thereof.

12th. For establishing esplanades, boulevards, park ways, park grounds, and public reservations in, around and leading to public buildings and for the purpose of reselling such land with reservations in the deeds of such resale as to the future use of said lands so as to protect public buildings and their environs and to preserve the view, appearance, light, air and usefulness of public grounds occupied by public buildings and



esplanades and park ways leading thereto. [1904, April 25, 97 v. 333.]

(1) **Old sections.**—The appropriation provisions of the new Code correspond to former chapter 3, division 7, title 12 R. S. (§§ 2232-2261) repealed. For a judicial construction of former chapter 3, see *Toledo St. Ry. Co. v. Fostoria*, 7 C. C. 293 (aff'd without report, 56 O. S. 726).

(2) **Strictly construed.**—The power conferred to appropriate property, such as is given by this section, must be strictly construed. *Toledo St. Ry. v. Fostoria*, 7 C. C. 293, 295 (aff'd by Supreme Court without report, 56 O. S. 726); *Harbeck v. Toledo*, 11 O. S. 219.

**Scope of powers.**—The lawful exercise of the powers conferred on municipal corporations to enter upon and take private property for certain purposes enumerated, requires a legal appropriation as provided by statute, involving the assessment of compensation for the property when taken without the owners' consent. *Mansfield v. Balliett*, 65 O. S. 451, 460.

**Purposes.**—The determination of particular purposes for which the power of eminent domain shall be exercised, rests entirely with the Legislature. *Giesy v. R. R. Co.*, 4 O. S. 308.

A right to appropriate land for a certain purpose may carry with it the right to appropriate for purposes incidental to the original purpose. *Ward v. M. & N. Tp. & Bridge Co.*, 6 O. S. 15.

A municipal corporation may appropriate an easement in land abutting on a street for the purpose of making a sloping fill to afford lateral support to the street. *Dodson v. Cincinnati*, 34 O. S. 276.

Ditches and drains were held to be public uses which justify condemnation. *Sessions v. Crunkilton*, 20 O. S. 349; so were canals, *Willard v. Hamilton*, 7 O. pt. 2, 111.

Municipality cannot appropriate

property for a railroad under guise of opening a street. *Morehouse v. Norwalk*, 6 B. 267.

**Property already devoted to public use.**—Under the general power to lay off and establish streets, a municipal corporation may extend a street across a right of way of a railroad, provided the second use is not inconsistent with the first. *Little Miami R. R. Co. et al. v. Dayton*, 23 O. S. 510.

But lands already devoted to a public use cannot be condemned to a second public use inconsistent with the first. *B. & O. R. R. Co. v. Belaire*, 4 B. 201; unless the power to do so is clearly and expressly given by statute. *R. R. Co. v. Dayton*, 23 O. S. 510; *R. R. Co. v. Belle Centre*, 48 O. S. 273.

The express grant of power to municipal corporations to appropriate property of a railroad for street purposes, does not exclude the appropriation of such property for any other purpose permitted under the general grant of powers. *R. R. Co. v. Belle Centre*, 48 O. S. 273.

It was held that under the power conferred by former § 2232 R. S. municipal corporations may appropriate for public offices or a prison, lands of a railroad company not needed or used in the operation of its road. *Ib.*

**Amount taken.**—Though the words "but no more shall be taken or appropriated than is reasonably necessary for the purpose to which it is to be applied" found in the former statute are not included in this section, it would seem that this limitation is nevertheless implied. See *Giesy v. R. R. Co.*, 4 O. S. 308.

The discretion to determine the quantity of property required for the purpose for which it is taken rests with the corporation, and its determination will not be disturbed, in the absence of fraud or bad faith. *R. R. Co. v. Ironton*, 19 O. S. 299.

The appropriation by a city of land for park purposes vests in the city, not the fee, but an easement for the purposes intended. *Newton v. Manufacturers' Ry. Co.*, 14 O. F. D. 156.

**When right to possession accrues.**—The right of a city to take and hold property for street purposes does not accrue until compensation has been assessed by a jury. *Garvin v. Columbus*, 5 N. P. 236.

**Estoppel to question validity of proceedings.**—A co-tenant is not estopped to question the validity of appropriation proceedings by the acceptance of the compensation money by his co-tenant. *Garvin v. Columbus*, 5 N. P. 236.

**Collateral attack.**—In the absence of fraud or prejudice, plaintiff seeking to enjoin a street assessment cannot complain of irregularity of previous appropriation proceedings. *Hendrickson v. Toledo*, 3 C. C. (N. S.) 355; 23 C. C. 256.

**What use requires compensation.**—The use of streets for sewers and drains does not require additional compensation. *Cincinnati v. Penny*, 21 O. S. 499.

Construction of a public ditch across a railway track is an appropriation of the railway company's property for which compensation must be made. *R. R. Co. v. Commissioners*, 63 O. S. 23.

The water taken by a city for its own use and supplied to its inhabitants, is taken by virtue of its rights as a riparian proprietor and not by virtue of its power of eminent domain, and it need not pay compensation to lower proprietors for such use. *Canton v. Shock*, 66 O. S. 19.

**Estoppel to claim compensation.**—If a R. R. Co. has been

allowed to occupy a street on condition that the city shall not be required to appropriate in order to cross the tracks with other streets, the company will be estopped to claim compensation. *R. R. Co. v. Hamilton*, 3 C. C. 455.

**Who entitled to compensation.**

—Where property, given for a specific charitable purpose, with a clause of reverter if used for other purposes, is condemned by a municipality for a street, the compensation goes to the owner at time of condemnation and not to the grantor. *Babb v. Cincinnati*, 36 B. 206.

**Measure of compensation.**—

See notes to § 15 of the Code.

**Assessment to pay compensation.**—See notes to § 50 of the Code.

**Property taken without appropriation proceedings** — *Owner's rights.*—When property has been taken by a municipality and devoted to a public use, without being first appropriated by regular proceedings, the value of the land may be recovered by the owner in proceedings instituted by him against the city. *Longworth v. Cincinnati*, 48 O. S. 637.

**Must show title.**—Owner suing municipality for value of lands unlawfully taken must show good title; validity of tax title considered. *Boone v. Cincinnati*, 13 Dec. 256.

**Estoppel to sue.**—The fact that owner acquiesced in the appropriation as an accomplished fact and ratified it by tendering a deed and offering to allow judgment that, upon value being fixed plaintiff should be ordered to convey to the corporation, does not estop the owner to sue for compensation or constitute a dedication of the land to pub-

lic use. *Longworth v. Cincinnati*, 48 O. S. 637.

The fact that owner bought land with knowledge of city's use of it for street purposes and expenditure of money therefor will not estop him from recovering compensation for unlawful taking. *Boone v. Cincinnati*, 13 Dec. 256. (Aff'd 72 O. S. 682.)

The fact that the owner of property, a part of which is unlawfully appropriated to widen a street, puts down a sidewalk either voluntarily or by order of the city, does not show dedication. *Webber v. Toledo*, 3 C. C. (N. S.) 319; 23 C. C. 237.

*Date of valuation.*—Value of land at time the owner begins proceedings, and not at the date when it was unlawfully taken, governs. *R. R. Co. v. Perkins*, 22 C. C. 630, aff'd 49 O. S. 326; *Boone v. Cincinnati*, 13 Dec. 256.

*Statute of limitations.*—Owner suing municipality for compensation is not barred until expiration of six years from time he was precluded from enforcing his right to recover possession of land. *Ib.*

**Appropriation of municipal property.**—See note under par. 26, § 7 of the Code, p. 62.

**Money in treasury.**—As to necessity for certificate of money in treasury before beginning appropriation proceedings, see notes to § 45 of the Code.

(3) **Damages caused by improvement**—*Liability.*—See notes to § 54 of the Code.

(4) **Crossing railroad tracks.**—The power expressly given to appropriate a right of way across railroad tracks for street purposes would not include appropriation of such property for other municipal uses. *R. R. Co. v. Belle Centre*, 48 O. S. 273. The compensation would give right to use of the land for any and all street purposes, but would not include new servitudes, and for these the railroad would be entitled to additional compensation. *C. C. & St. L. Ry. Co. v. U. B. & N. Ry.*

*Co.*, 26 C. C. 180. A street railway would not be such new servitude. *Ib.*

Where street is extended across tracks, railroad company is entitled to compensation for cost of bridge to carry its trains over street. *Railway Co. v. Troy*, 68 O. S. 510.

Where the municipality is about to file a petition in the probate or common pleas court in an action to appropriate a right of way across a railroad track, the railway company may, in a proper case, enjoin the appropriation on the ground that it will unnecessarily interfere with the reasonable use of the property so crossed, and the court may restrain further proceedings in the appropriation case until the claim of the company has been judicially determined. *Ry. Co. v. Greenville*, 69 O. S., 487. *Contra*, *Cleveland, etc., Ry. Co. v. Akron*, 1 C. C. (N. S.) 174.

(5) **Railway in park.**—Property already devoted to the use of a public park may be subject to the uses and purposes of a railway company. *Colby v. Toledo*, 22 C. C. 732; aff'd 68 O. S. 698.

**Compensation for market.**—As to compensation to property owners for market in street, see *Pruden v. Cincinnati*, 12 C. D. 721.

(6) **Offices and prisons.**—The lands of a railroad company may be appropriated for public offices, prisons, etc. *R. R. Co. v. Belle Centre*, 48 O. S. 273.

(7) See preceding note.

(8) **Location of pest house.**—See note under § 2169, p. 366.

(9) **Land for wharf.**—Under a statute authorizing the appropriation of property for a public wharf the discretion of determining the quantity of ground required is vested in the municipality and the courts will not interfere, if the discretion is exercised in good faith. *Iron R. R. Co. v. Ironton*, 19 O. S. 299.

*Municipal liability.*—The authority to acquire sites for levees conferred as here, does not impose a duty on a municipality. If a city



does make provision to protect lands from overflow, under such authority, it is not liable on account of the inadequacy of the provisions which it sees fit to make. *Hamilton v. Ashbrook*, 62 O. S. 511.

(10) **Canal is public work** for which appropriation may be allowed. *Willyard v. Hamilton*, 7 O. pt. 2, 111.

(11) **Ditches and drains** are public uses of property which justify condemnation. *Sessions v. Crunkilton*, 20 O. S. 349.

*Compensation.*—The construction of a public ditch across or upon a

railroad right of way is an appropriation of the railroad company's property which entitles the company to compensation. *R. R. Co. v. Commissioners*, 63 O. S. 23.

*Appropriation of private sewer.*—Where a municipality has appropriated a private sewer for public use either by depriving the owner of all dominion over it, or for a special purpose, and the owner tendered a deed to the property wrongfully taken, it is for the jury to determine the question of compensation. *McDonald v. Cincinnati*, 4 N. P. 253.

§ 11. [In what cases property may be appropriated outside of municipality; proviso.] In the appropriation of property for any of the purposes named in the preceding section, the corporation may, whenever the same is reasonably necessary, acquire property outside the limits of the corporation; but no land shall be appropriated or obtained for public cemeteries within two hundred yards of any dwelling house without the consent, in writing, of the owner of the tract of land on which such dwelling house may be situated.<sup>1</sup>

(1) **Old sections.**—The right to acquire property outside the corporation was, by the former statutes, given only in the case of appropriation of material for the improvement of the streets (§ 2232, par. 1); for public parks (par. 10); for wa-

terworks and electric light purposes (par. 12); for cemeteries (par. 14); for levees (par. 16); and for sewers, ditches and drains (par. 19). See note to § 2642 R. S., under Code § 28.

§ 12. [Resolution and notice of intent to appropriate; ordinance.]<sup>1</sup> Whenever it is deemed necessary to appropriate property, council shall pass a resolution, declaring such intent, defining the purpose of the appropriation, and setting forth a pertinent description of the land, and the estate or interest therein desired to be appropriated; and for waterworks purposes the council may appropriate such property as it may

determine to be necessary; and immediately upon the passage of such resolution, declaring such intent, for which but one reading shall be necessary, the mayor shall cause written notice thereof to be given to the owner, person in possession thereof, or having an interest of record in, every piece of property sought to be appropriated, or to his authorized agent, and such notice shall be served by a person designated for the purpose, and return made in the manner provided by law for the service and return of summons in civil actions, and in case said owner, persons, or their agents, can not be found, notice shall be given by publication once a week for three consecutive weeks in a newspaper of general circulation in the corporation, and council may thereupon pass an ordinance by the votes of two-thirds of all members elected thereto, directing said appropriation to proceed.<sup>2</sup> [1906, April 14, 98 v. 164.]

(1) **Old sections.**—This section corresponds to §§ 2234 and 2235 R. S. repealed.

(2) **Appropriations for street improvements.**—Sec. 2642 R. S. which is re-enacted by the Code (see § 28 of the Code), provides specially for appropriations of property for opening, widening, etc., of streets, and requires that "council shall provide by ordinance for the same."

Former § 2235 to which the present section corresponds, and relating, as the present section does, to appropriations for all purposes, provided merely for a resolution declaring intent to appropriate, but did not provide for an ordinance to appropriate. Cases under the former § 2235 R. S. held that in case of opening, widening, etc., of streets, the special provisions of § 2642 R. S. requiring an ordinance to appropriate but not the preliminary resolution, would govern and that the preliminary resolution provided for in § 2234 R. S. was not necessary

when the appropriation concerned street improvements. See *Krumberg v. Cincinnati*, 29 O. S. 69; *Tyler v. Columbus*, 6 C. C. 224; *Caldwell v. Carthage*, 49 O. S. 334; *Cincinnati v. Mathers*, 6 Dec. (Re.) 755; *Toledo v. Bayer*, 7 N. P. 324. In *Toledo v. Bayer*, *supra*, the court noted the variance between §§ 2234 R. S., 2235 R. S. and 2642 R. S., and applied the rule that "where there is a general provision in regard to the method of procedure regarding several subjects followed by a special provision as to the procedure in regard to one or more of the subjects, the special provision will govern." It will be noticed that in the above § 12, both the preliminary resolution and the ordinance to appropriate are required. In view of this, the safe course, in the case of appropriations for opening, etc., of streets, would be to have both the resolution and the ordinance, the ordinance being passed by a two-thirds vote and de-

scribing the property as required by § 2642 R. S.

The preliminary resolution, provided for in § 12, was held necessary in *Erie Railway Co. v. Youngstown*, 26 C. C. 679; 5 C. C. (N. S.) 332.

§ 2642 R. S. does not provide all that must be done to appropriate property for the purpose therein specified. The appropriation proceedings must be had as provided in the general laws relating to the appropriation of property generally. *Garvin v. Columbus*, 5 N. P. 236.

**Sufficiency of notice.**—As to the sufficiency of notice to inform property owners of city's intent to appropriate an easement, see *Fenner v. Cincinnati*, 4 N. P. 182. Failure to file claim for damages under insufficient notice not a forfeiture of right to recover. *Ib.*

Mortgagees need not be notified of intention to appropriate. Notice to legal owners is sufficient. *Put-in-Bay v. Stimmel*, 18 C. C. 644.

**Effect of appropriation ordinance.**—The passage of the appropriation ordinance appropriates the property, and improvements made thereon after that date are at the owner's risk. *Toledo v. Bayer*, 7 N. P. 324. But see *Stribley v. Cincinnati*, 9 C. C. 122, where it is held that the value of the property is to be determined as of the time of trial and not as of the time of the passage of the ordinance; but it is said "that to some extent the passage of the ordinance may affect the property owner. He would not be allowed compensation, probably, if with notice of intent of city to improve, he unreasonably and in haste put improvements on the property."

Passage of the ordinance places the municipality in as advanced a state as private corporation after court has determined the preliminary questions. *Toledo v. Bayer*, 7 N. P. 324. *Ry. Co. v. Greenville*, 69 O. S. 487.

## ORDER OF PROCEDURE IN APPROPRIATION OF PROPERTY.

(1) *Resolution declaring intent*, defining purpose and describing property to be appropriated, for which but one reading is necessary.

(2) *Notice to the owners*, served, or published once a week for five consecutive weeks in case such owners or their agents cannot be found.

(3) *Ordinance to appropriate*, and directing the solicitor to apply to the proper court to assess compensation; to be passed by a two-thirds vote of council.

(4) *Application* to assess compensation.

(5) *Notice of application* and time and place of the same, served as other legal process, or, if service cannot be had, then by publication once a week for three weeks.

(6) *Time set for trial* by jury to assess compensation.

(7) *Jury summoned*, trial, verdict and judgment entry.



## FORM OF RESOLUTION DECLARING INTENTION TO APPROPRIATE.

Resolution No.....

Declaring intention to appropriate property for..... purposes.

Be it resolved by the council of the city [or village] of..... State of Ohio:

That it hereby declares its intention to appropriate for (street or park, etc.) purposes, for (opening.....street, or establishing a park at.....etc.) the following described property, to-wit: (here describe property to be appropriated.)

Passed.....19.....

Attest:

.....  
President of Council......  
Clerk.

## FORM OF ORDINANCE TO APPROPRIATE.

Ordinance No.....

To appropriate property for.....purposes.

Be it ordained by the council of the city [or village] of..... State of Ohio, two-thirds of all members elected thereto concurring,

Sec. 1. That the following described property be and the same is hereby appropriated to public use for.....purposes for (opening.....street, or other purpose) to-wit:

(Here give description of property appropriated.)

Sec. 2. That the solicitor be and is hereby authorized and directed to apply to a court of competent jurisdiction to have a jury impaneled to make inquiry into and assess the compensation to be paid for such property.

Sec. 3. That the costs and expenses of said appropriation be paid out of.....fund. (If bonds are to be issued, see § 100 *et seq.* of the Code.

Sec. 4. That this ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed.....19.....

Attest:

.....  
President of Council......  
Clerk.

§ 13. [Application to court, etc.] Upon the passage of the aforesaid ordinance, the solicitor shall make application to the court of common pleas or to a judge in vacation, to the probate court, or to the insolvency court, in the county in which the land sought to be taken is located, which application shall describe as correctly as possible the land to be appropriated,

the interest or estate therein to be taken, the object proposed,<sup>2</sup> and the name of the owner of each lot or parcel thereof. [1906, April 14, 98 v. 164.]

(1) **Old section**, 2236 R. S., repealed. See § 4686-27 R. S., which provides that § 2236 *et seq.* shall apply to townships.

(2) **Sufficiency of description.**

See *R. R. Co. v. Prentice*, 13 O. S. 373. A petition in appropriation should state the purpose sufficiently to show a public use and that the power is conferred by statute. *Ry. Co. v. Bohm*, 34 O. S. 114.

**Boundary lines.**—The determination of the extent of boundary lines

of property taken in condemnation proceedings is final between the municipality and the owner, and cannot be relitigated in another action between the same parties. *Cincinnati v. Hosea*, 19 C. C. 744; (*aff'd* without report, 66 O. S. 687).

**Amendment to application.**—Council cannot, while condemnation case is being tried, change by ordinance the terms of its application and ask for more property. *Grant v. Hyde Park*, 67 O. S. 166.

**FORM OF APPLICATION TO ASSESS COMPENSATION.**

.....Court.....County, Ohio.  
The city [or village] of

.....  
Plaintiff,

v.

(Insert names of all persons owning or claiming any interest in the property appropriated.)

Defendants.

} Application to assess compensation.

Now comes the city [or village] of....., State of Ohio, and represents that it is a city [or village] under the laws of Ohio, and that its Council by resolution duly passed on the.....day of.....19.... did declare its intention to appropriate the property hereinafter described, to public use, for [street, or park, etc.] purposes for [widening..... street, or for other purpose....., etc.] of which resolution due notice was given according to law, and by ordinance duly passed on the .....day of.....19....., two-thirds of all the members elected to council concurring therein, did direct the appropriation of said property to proceed;

That the several parties made defendants herein own or claim to own or have some title or interest in said property as the same is divided into lots or parcels and designated and shown on the plat filed herewith and made part hereof, and that the descriptions of said several lots or parcels and the names of the parties who own or claim to own or have an interest in the same, are as follows: (here insert separate description of each piece of property to be appropriated, giving name of the owner or person claiming an interest and state the interest claimed.)

Wherefore, plaintiff asks the court to cause a jury to be impaneled to make inquiry into and assess the compensation to be paid by the plaintiff for the property appropriated as above set forth, and that upon the pay-

ment to the owners or deposit of the amount so assessed, as the court shall order, possession of said property may be awarded it according to law.

.....  
City [or village] Solicitor.

#### PRECIPE.

To the Clerk:

Issue notice to the defendants named in the above application, that the plaintiff will, on the.....day of....., 19...., at.....M., apply to the Honorable....., Judge of the..... Court, of.....County, for the impaneling of a jury to make inquiry into and assess the compensation to be paid by the city [or village] of.....to the owners for the following property, to-wit: (Here insert description of the entire piece of property to be appropriated.)

.....  
City [or village] Solicitor.

§ 14. [Service of notice to owners of property.]<sup>1</sup> Notice of the time and place of such application shall be given in the ordinary manner of serving legal process,<sup>2</sup> to all owners<sup>3</sup> or agents of owners resident in the state, whose place of residence is known, and to all others by publishing the substance of the application, with a statement of the time and place at which it is to be made, once a week for three weeks<sup>4</sup> next preceding the time of the application in some newspaper of general circulation in the county.

(1) **Old section.**—This section corresponds to § 2237 R. S. repealed.

(2) **Service of notice.**—Service at residence within the jurisdiction is good. *Trustees v. O'Meara*, 2 B. 142. See generally *R. R. Co. v. Belle Centre*, 48 O. S. 273, 290.

In case of death of owner or person having an interest, pending proceedings, revivor must be had in the name of the heirs, and not administrators. *R. R. Co. v. Bohm*, 29 O. S. 633.

(3) **Mortgagee** whose mortgage is recorded must be notified. *Harrison v. Sabina*, 1 C. C. 49. And if property is taken without notice to

him he may sue the corporation and recover damages. *Ib.* And, generally, it would seem that all persons having an interest would come within the word "owners" in the statute. *Ib.* And see *Big Four, etc., Co. v. Cincinnati*, 12 Dec. 218.

(4) **Publication** for three weeks is satisfied by an insertion once each week for three weeks. *Early v. Doe*, 16 How. (U. S.) 610. But three full weeks should elapse after the first publication before the hearing is had. *Miller v. Pearce*, 2 C. S. C. R. 44, 50. But see *Cincinnati v. Fenner*, 8 N. P. 342 (reversed on other grounds, 65 O. S. 567).



## FORM OF NOTICE BY PUBLICATION.

## LEGAL NOTICE.

..... (naming persons to be notified by publication) are hereby notified that an application in writing substantially as herein set forth will be made by the city [or village] of ..... to the Hon. ...., Judge of the ..... Court of ..... County, Ohio, on the ..... day of ..... at ..... o'clock....M., to impanel a jury to assess the compensation to be paid by said city [or village] to the owners of the following described real estate: (Describe entire tract, and lots into which it is divided, giving the names of the owners), said property having been condemned and appropriated to public use for the purpose (state the purpose of appropriation), by a resolution declaring the intention to appropriate duly passed by the council of said city [or village] on the ..... day of ..... 19...., and an ordinance directing the appropriation to proceed, duly passed by said council on the ..... day of ..... 19...., and the plaintiff asks that upon payment to the owners or deposit of the amount of compensation assessed, as the Court shall order, possession of said property may be awarded it according to law.

.....  
City [or village] Solicitor.

§ 15. [Court to fix time for inquiry, etc.]<sup>1</sup> If it appear that such notice has been served five days before the time of application, or has been duly published, or that such notice has been waived, the court shall set a time for the assessment of compensation by a jury;<sup>2</sup> provided, that the same may be made at a special term of court, and the jury shall be drawn and the trial proceed as in other civil actions.<sup>3</sup>

(1) **Old sections.**—This section corresponds to §§ 2238, 2239 and 2240 R. S. repealed.

(2) **Waiver of jury** is not a fatal irregularity and cannot be taken advantage of collaterally. *Hendrickson v. Toledo*, 23 C. C. 256; 3 C. C. (N. S.) 355. See also *Colby v. Toledo*, 22 C. C. 732, (aff'd 68 O. S. 698).

(3) **Proceedings.**—Appropriation proceedings by municipal corporations are now made to conform to proceedings in "other civil actions," except where governed by the special provisions in §§ 12 to 22 inclusive of the Code.

**Continuances.**—No provision is made for continuing the time of hearing as was provided in § 2241 R. S. repealed, but this would be covered by the general provision that the trial shall proceed as in other civil actions.

**Scope of preliminary hearing.**

—There is no authority for filing an answer to the application to assess compensation. *Ry. Co. v. Greenville*, 69 O. S. 487. So a railway company was held not to have the right to file an answer setting up that a crossing of its property by a street would unnecessarily interfere with railway uses. *Ib.* Whether court may grant leave to file an answer to the application, see *R. R. Co. v. Hyde Park*, 4 N. P. 296; *Ry. Co. v. Greenville*, 69 O. S. 487, 497. When the resolution and ordinance have been passed and recorded the municipal power has been exercised and the appropriation made, and further proceedings are for compensation to the owner whose property has been appropriated. *Ry. v. Greenville*, 69 O. S. 487, 493. The court only determines in the preliminary hearing that notice has been duly served. *Ib.*; (*contra*, *Toledo R. R. Co. v. Toledo*, 7 N. P. 285); and cannot consider

the question whether the proper preliminary resolution has been duly passed by council. *Erie Railway Co. v. Youngstown*, 26 C. C. 679; 5 C. C. (N. S.) 332.

The proper remedy, where preliminary requisites have not been complied with by the municipality, is an action to enjoin the municipality from continuing with the condemnation proceeding. *Erie Railway Co. v. Youngstown*, 26 C. C. 679; 5 C. C. (N. S.) 332; *Ry. Co. v. Greenville*, 69 O. S. 487.

**Separate trials.**—Under former statutes it was held that property owners were not entitled to separate trials and there could be but two peremptory challenges on each side of the case. *Cincinnati v. Neff et al.*, 19 B. 404. But as to number of peremptory challenges see the act of April 29, 1902 (95 v. 308).

**Compensation—for what made.**—Where the city appropriates an easement on property for a sloping fill in connection with street construction, compensation must be made for the damages resulting from taking the easement, but the fee in the land need not be paid for. *Dodson v. Cincinnati*, 34 O. S. 276.

Compensation must be allowed for diversion of a watercourse, made necessary by the appropriation of property. *Hueston v. R. R. Co.*, 4 O. S. 685.

Railroad company is entitled to compensation for cost of bridge over street, when its property is appropriated to extend a street under its tracks. *Ry. Co. v. Troy*, 68 O. S. 510.

If fair and reasonable rent of property appropriated exceeds amount fixed in terms of lease, the lessee may be compensated for the difference. *Cincinnati v. Neff*, 20 B. 8.

The lessee of property appropriated for a street is still liable for the rent and he must be compensated. *Foote v. Cincinnati*, 11 O. 408.

If a tract is platted into lots and the plat recorded, the corporation is not liable to pay damages to lots not taken as "damages to the residue." *Banning v. Trustee Southern Ry.*, 3 B. 965.

A lessee's damages for improvements made by him under a parol lease for three years destroyed by

opening a street, must come from the lessor and not from the city. *Clark v. Cincinnati*, 1 Dec. (Re.) 10.

Riparian rights are property which must be paid for and city injuring natural watercourse by the emptying of sewage must make compensation to riparian owner. *Mansfield v. Balliett*, 65 O. S. 451.

As to case of lease expiring before payment of the award, see *Cleveland v. Cuyahoga, etc.*, 41 O. S. 600.

The value of the property at the time of trial, and not at the date of the condemnation ordinance is to be given. *Stribley v. Cincinnati*, 9 C. C. 122. But see *Toledo v. Bayer*, 7 N. P. 324.

#### **What compensation includes.**

—The appropriation of property for street purposes embraces not only an ascertainment of compensation to the owner for land taken, but damages to the residue of his abutting property, and where a municipality in its application makes general demand for an appropriation for street purposes, the effect of a judgment in such case is to give the municipality the right to use the land for all street purposes including the right to establish a reasonable and proper grade, and any damages that may arise from such change of grade are included in said appropriation proceedings. *Grant v. Village of Hyde Park*, 47 B. 831 (67 O. S. 166); *Tenney et al. v. Cincinnati*, 47 B. 832; 24 C. C. 237; (67 O. S. 518).

#### **Measure of compensation.**—

The elements of compensation are, (1) the abstract value of the land taken, (2) the value arising from the relative situation of the land, taken in connection with the residue of the owner's land from which it is severed, and, (3) the effect upon

the value of the residue of the owner's land arising from the uses to which the part taken is appropriated. *R. R. Co. v. Ball*, 5 O. S. 568; *Lorain St. Ry. Co. v. Sinning*, 17 C. C. 649.

As to the measure of compensation when land devoted to a public use is transferred to another public use, see *Hatch v. R. R. Co.*, 18 O. S. 92; *Goodin v. Canal Co.*, 18 O. S. 169; *R. R. Co. v. Zinn*, 18 O. S. 417.

*Fair market value* of the land at time of taking must be paid the owner and jury cannot consider, or make use of the fact that it has been increased in value by the proposed construction of the improvement. *Giesy v. R. R. Co.*, 4 O. S. 308. But as to increase in value by proposed erection of a city hall for which property was appropriated, see *Cincinnati v. Neff*, 20 B. 8.

Fair market value of property appropriated is that amount which the owner may reasonably expect to sell for at time of condemnation and at a voluntary, not a forced, sale. *Ry. Co. v. Knauss*, 47 B. 807.

*Damages to residue* must be actual and not theoretical or speculative. *Id.*

Compensation for toll house when turnpike is brought within city limits, see *Turnpike Co. v. Cincinnati*, 6 N. P. 233.

*Value of leasehold* taken, how measured, see *Cincinnati v. Eversman*, 4 O. L. R. 140; *Cincinnati v. Neff*, 20 B. 8.

**Evidence**—*Burden*.—The burden to establish value is on the owners. *Cincinnati v. Neff*, 20 B. 8.

*Special benefits*.—Special benefits connected with the appropriation of the specific land may be taken into consideration in estimating compensation. *Ry. Co. v. Williams*, 9 B. 253; *R. R. Co. v. Ball*, 5 O. S. 568. But whether special benefits not connected with the locality or subject matter may be considered *quere* R.

*R. Co. v. Ball*, 5 O. S. 568; and see *R. R. Co. v. Collett*, 6 O. S. 182, and *Ry. Co. v. Longworth*, 30 O. S. 108, 112.

General and special benefits defined. *R. R. Co. v. Collett*, 6 O. S. 182; *Schaible v. Ry.*, 10 C. C. 334.

*Rental*.—Rental may be proved as tending to show value of the premises. *Cincinnati v. Neff*, 20 B. 8.

*Special adaptability* of the land to the purposes of the condemning corporation cannot be considered. *Gibson v. Norwalk*, 13 C. C. 428.

*Speculative value* cannot be considered. Value cannot be enhanced by evidence of a contingent character such as probable rents dependent on will of others who may require the land as a roadway. *Powers v. Railway*, 33 O. S. 429.

But loss of trade or business or diminished rental may be shown. *Railway v. Railway*, 30 O. S. 604, 623; *Railway v. Gardner*, 45 O. S. 309.

*Improvements injured*.—The cost of tile draining injured by the appropriation, cannot be shown. *Schaible v. Ry.*, 10 C. C. 334, 338; but if there is no market value for improvements on the land taken and no value established under any rule, their cost may be shown as an element of value. *Foote v. R. R. Co.*, 21 C. C. 319.

*Opinion*.—Witness cannot give his opinion as to the amount of damages land owner will sustain by the appropriation; but he may give his opinion as to the value of all the land before and after the appropriation of a part. *R. R. Co. v. Campbell*, 4 O. S. 583; *R. R. Co. v. Ball*, 5 O. S. 568; *R. R. Co. v. Gardner*, 45 O. S. 309. But see *Miller v. Weber*, 1 C. C. 130.

Opinions of value based on sales



but not actual sales may be put in evidence. Neither forced sales nor forced purchases give the standard. *Ry. Co. v. Garrard*, 7 B. 272; *Cincinnati v. Neff*, 20 B. 3.

*Platted land.*—The owner may show that the land has been platted for future subdivision as a matter affecting its value. *Ry. Co. v. Longworth*, 30 O. S. 108. An unrecorded map is admissible for this purpose. *R. R. Co. v. Perkins*, 22 C. C. 630.

It is not error to permit the introduction of a plat to show the quantity of land in each of the parcels appropriated if the engineer who drew it, testifies to its correctness. *Neff v. Cincinnati*, 32 O. S. 215.

The fact that lands have been platted and laid out in building lots may be considered in determining their value. *Ry. Co. v. Knauss*, 47 B. 807.

**Verdict** must show separately compensation for land taken and

damages to residue. *Ry. Co. v. Knauss*, 47 B. 807.

Where in a condemnation suit testimony is received tending to establish a number of different methods of grading a street and bearing upon the probable grade which the municipality may in the future adopt, and the jury has found substantial damages to the residue of the lands and return the same in a general verdict, and has at the same time returned a special verdict to the effect that damages are allowed on account only of future grade which might be established, and that if the street should be improved on a grade which would not necessitate a certain cut there would be no damage, it is error to disregard the general verdict and to hold that the same is controlled by the special verdict, and upon that ground set aside the amount found in the general verdict as damages to the residue. *Grant v. Hyde Park*, 47 B. 831; (67 O. S. 166).

#### FORM OF ENTRY.

|                          |               |        |
|--------------------------|---------------|--------|
| State of Ohio, .....     | County, ..... | Court. |
| The city [or village] of |               |        |
| .....                    |               |        |
| Plaintiff,               | }             | Entry. |
| v.                       |               |        |
| .....et al.              |               |        |
| Defendants.              |               |        |

This cause coming on to be heard upon the application of the city [or village] of.....to impanel a jury to assess the compensation to be paid the owners of the property described in said application and the court finding that all the resident defendants have been duly served with notice of the pendency of the application in the ordinary manner of serving legal process at least five days prior to this application and that all non-resident defendants have been served with notice by the publication of the substance of the application in the....., a newspaper of general circulation in the county, once a week for three consecutive weeks from and after the.....day of.....19...., and that all the proceedings are regular and valid, does hereby order that a jury be

impaneled on the.....day of.....19....., at.....o'clock  
....M. for the purpose of assessing the compensation to be paid for said  
property.

§ 16. [View of premises; guardian ad litem; how jury to return assessment; open and close of case.]<sup>1</sup> A view of the premises shall be ordered when desired by the jury or demanded by any party to the proceedings.<sup>2</sup>

If, at the time of the application, it appear that any of the owners of the property sought to be taken are infants or insane, and that they have no guardian, a guardian *ad litem* shall be appointed in their behalf; and no delay in the proceedings shall be occasioned by doubt as to the ownership of any property, or as to the interests of the respective owners, but in such cases the court shall require a deposit of the money allowed as compensation for the whole property or the part in dispute; and in all cases, as soon as the corporation shall have paid the compensation assessed, or secured its payment by a deposit of money under the order of the court, possession of the property may be taken.

The assessment shall be in writing, signed by the jury, and shall be so made that the amount payable to the owners of each lot or parcel of land may be ascertained.<sup>3</sup> The owners shall have the right to open and close the case.<sup>4</sup> When a building or other structure is situated partly upon the land to be appropriated, and partly upon adjoining land, and such structure cannot be divided upon the line between such lands, without manifest injury, the jury in assessing compensation to any owner of the land, shall assess the value of the same, exclusive of the structure, and make a separate estimate of the value of the structure; the owner of the structure may elect to retain the same and remove it, or to accept the value thereof as estimated by the jury; if he fail to make such election, within ten days from the final determination of the cause, he shall be deemed to

have elected to accept the value of the structure, as fixed by the jury.

(1) **Old sections.**—This section corresponds to §§ 2242, 2243, 2245, 2250 R. S. repealed.

(2) **View of the premises** is solely to enable the jury to apply the testimony. It cannot be considered by the jury as evidence. *Columbus v. Bidlingmeier*, 7 C. C. 136; *Besuden v. Commissioners*, 7 C. C. 237.

Purpose of view of premises is to enable jury to better understand and apply the evidence and not to ascertain for themselves the value of the

property. *Ry. Co. v. Knauss*, 47 R. 807.

(3) **Conclusiveness of award.**—City estopped after lapse of years to deny title in person designated in its application as owner and to whom award of compensation was made. *Toledo v. Weber*, 23 C. C. 564.

(4) **Open and close.**—Where no provision was made as to the open and close of the case, it was held not error to permit city to open and close. *Neff v. Cincinnati*, 32 O. S. 215.

§ 17. [Verdict in whole or in part.]<sup>1</sup> The jury shall be sworn to make the whole inquiry and assessment, but may return a verdict as to part and be discharged as to the rest, in the discretion of the court; and in case a jury is discharged from rendering a verdict in whole or in part, another shall be drawn and impaneled at the earliest convenient time, who shall make the whole inquiry and assessment, or the part not made.

(1) **Old section.**—This section corresponds to § 2246 R. S. (repealed).

#### FORM OF OATH TO JURY.

You, and each of you, do solemnly swear that you will justly and impartially inquire into and assess, according to your best judgment, the amount of compensation due the proper owners in the cases which will be brought before you in this proceeding, by reason of the appropriation of their property, described in the application, to the public use by the plaintiff corporation, the city [or village] of.....in the proceeding now pending irrespective of any benefit from any improvement proposed by such corporation; and you do further swear, that you will, in assessing any damages that may occur to such property owners, by reason of the appropriation other than the compensation, further ascertain how much less valuable the remaining portion of said property will be in consequence of said appropriation; this you swear as you shall answer to God.

#### FORM OF VERDICT.

We, the jurors, in this case, duly impaneled and sworn, do assess as the compensation to be paid by the city [or village] of.....to the owner or owners of the several lots and parcels of land described in the



application herein as follows: 1st. To the owner or owners of lot or parcel No. 1.

Value of land, including buildings and other structures situated wholly on part taken, ..... dollars and ..... cents (\$.....).

Damages to residue.....dollars and.....cents (\$.....).

Value of buildings [or other structures] situated partly on part taken, .....dollars and.....cents (\$.....).

To the owner or owners of lot or parcel No. 2, etc.

(To be signed by all the Jurors; see § 16 of the Code.)

**§ 18. [Orders as to payment or deposit of assessment.]<sup>1</sup>**

The court shall make such order as to payment, deposit or distribution of the amounts assessed as may seem proper, may require adverse claimants to all or any part of the money or property to interplead and fully determine their rights in the same proceeding and may direct the time and manner in which possession of the property condemned shall be taken or delivered, and may, if necessary, enforce any order giving possession;<sup>2</sup>

**[Effect of payment or deposit.]** and upon the payment or deposit, by the corporation, of the amount assessed, as ordered by the court, an absolute estate in fee simple shall be vested in said corporation, unless a lesser estate or interest is asked for in the application, in which case such lesser estate or interest as is so asked for shall be vested; and any municipal corporation shall have the power to again appropriate, in conformity with the provisions of this act, any real estate which it has previously, lawfully appropriated, in order to perfect, in it, a title in fee simple absolute to such previously appropriated real estate. [1906, April 14, 98 v. 164.]

(1) **Old sections.**—This section corresponds to §§ 2247 and 2248 R. S. (repealed).

(2) **Property subject to lease.**—If city is given right to take possession of property subject to a

lease, and the lease expires before possession is taken, the city must nevertheless pay the lessee the amount awarded to it before taking possession. *Cleveland v. Cuyahoga*, etc., Society, 41 O. S. 600.

**FORM OF JUDGMENT ENTRY.**

|                               |                   |        |
|-------------------------------|-------------------|--------|
| State of Ohio .....           | County, .....     | Court. |
| The city [or village] of..... | } Judgment Entry. |        |
| Plaintiff.                    |                   |        |
| v.                            |                   |        |
| .....et al.                   |                   |        |
| Defendants.                   |                   |        |

This cause coming on to be heard upon the application of the city [or village] of.....for the assessment of compensation to be

paid to the owners of the lots described in the application and all interests therein appropriated by the said city [or village] for.....purposes (state the purpose of the appropriation) and all parties having been duly and legally served with process and a jury having been impaneled to assess the compensation and having viewed the premises, heard the testimony of witnesses, the arguments of counsel and the charge of the court and having returned their verdict into court assessing the compensation to be paid for the several lots therein mentioned as follows; (copy verdict). And the court having examined all the proceedings herein finds them all regular and according to law and does further find that said lots of land and the several interests therein belonged to the persons whose names are set opposite to them as below set forth.

It is therefore ordered and adjudged that said verdict and the several assessments made therein be and they are hereby confirmed.

It is further ordered that said corporation pay [or secure to be paid by a deposit of money under the direction of this court] within.....days the amount of compensation so assessed for the use of the following named persons (give names of owners and amount of compensation assessed to each). And it is further ordered that upon payment [or deposit] by said corporation of the several amounts allotted by the jury to the persons above mentioned as the owners of the several lots, or into court, that the city [or village] shall be entitled to all interests and estate in, and to the possession of, the lots and parcels above mentioned and that an order shall issue to the sheriff of.....County, to put the plaintiff into possession of said property and interests.

It is further ordered that said corporation within.....days from this date, pay the costs herein, taxed at.....dollars.

§ 19. [Costs, how paid.]<sup>1</sup> The costs<sup>2</sup> of the inquiry and assessment shall be paid by the corporation, and all other costs taxed as the court may direct; provided, that at or after the time of making the application, the corporation may offer to confess judgment for an amount to be stated, and the costs then made, in favor of any owner, who in any manner enters appearance, or upon whom or whose agent personal service may be made; whereupon, if such owner shall refuse to accept such offer, and on the trial shall not recover more, he shall pay all costs accruing after the offer, and an offer so made shall be governed by the provisions of section 5142 of the Revised Statutes of Ohio.

(1) **Old section.**—This section corresponds to old § 2249 R. S. (repealed). § 2249 contained a provision making it applicable to cases under subdivision 11, chapter 4, di-

vision 7, title 12. This provision is omitted here.

(2) **Jury fees** in the Probate Court held not to be a part of the costs in an appropriation proceeding. *Hill v. Durr*, 47 B. 440.

§ 5142 R. S. [Such offers not to affect the trial.] An offer made as provided in the three preceding sections<sup>1</sup> shall not be deemed an admission of the cause of action, nor of the amount to which the plaintiff is entitled; nor shall it be a cause of continuance of the action, or a postponement of the trial, or given in evidence or mentioned on the trial. [51 v. 57, §§ 493, 494, 498, 499; S. & C. 1094, 1095.]

(1) Sections referred to herein are §§ 5139, 5140 and 5141 R. S. As to form and sufficiency of offer and construction of sections referred to, see *Adams et al. v. Phifer et al.*, 25 O. S. 301; *Tipton v. Tipton*, 49 O. S. 364; *Armstrong v. Spears*, 18 O. S. 373; *Fike v. France*, 12 O. S. 624.

FORM OF OFFER TO CONFESS JUDGMENT.

State of Ohio, .....County.....Court.  
The city [or village] of  
.....  
Plaintiff.  
v.  
.....et al.,  
Defendants. } Offer to confess judgment.

Now comes the city [or village] of....., plaintiff corporation herein, and, before the impaneling and swearing of the jury herein, (or here insert time when offer is made) offers to allow judgment to be taken in this action in favor of....., a party defendant herein and against said city [or village] in the sum of.....dollars and .....cents, as compensation to said.....owner of lot [or parcel] No..... described in the application herein, together with the costs to the time of this offer.

.....  
City [or village] Solicitor.

§ 20. [Interested parties may give bond, etc.]<sup>1</sup> Any person may, before or after the passage of an ordinance for opening a street or other public highway, execute his bond<sup>2</sup> payable to the corporation to the acceptance of council, conditioned for the payment of all damage which may be assessed by the jury; and such bond shall be good in law, and if such person pay or deposit according to the order of court, then such street or other highway shall be opened; or the corporation may at its discretion make such payment or deposit, and collect by law the amount of such damages of such person or his sureties.<sup>3</sup>



(1) **Old section**, 2251 R. S., repealed.

(2) **Form of bond**.— See form used and discussed in *Inclined Plane Ry. Co. v. Cincinnati*, 23 B. 68.

(3) **Validity of bond** to pay all damages, see *Toledo Ry. Co. v. Fostoria*, 7 C. C. 293, 299.

*Acceptance of bond*.— As to what constitutes, see *Ry. Co. v. Cincinnati*, 23 B. 68.

*No repayment*.— § 2251 R. S. (repealed) was held not to contemplate any repayment to interested party giving bond other than that found in the beneficial interest because of the proposed appropriation. *Ry. Co. v. Cincinnati*, 25 B. 91; (aff'd by Supreme Court, 32 B. 400) and city cannot legally make a contract for such repayment. *Id.*

§ 21. [Review of proceedings; appeal to Court of Common Pleas.]<sup>1</sup> The municipal corporation, or the owner of any property, the value of which has been assessed, as herein provided, shall have the right to prosecute error as in other civil actions; provided, that the trial court may, upon proper terms, suspend the execution of any order, but in all cases where the municipal corporation pays or deposits the compensation assessed, and gives adequate security for any further compensation and costs, the right to take and use the property condemned shall not be affected by any such review.<sup>2</sup>

Where the proceeding is had in the Probate Court, or in the Insolvency Court, any party interested in the inquiry and assessment may take an appeal to the Court of Common Pleas; and thereupon the same proceedings shall be had as if the application had been originally made in that court, except that the corporation shall not be required to give notice of its application, and the inquiry and assessment shall be limited to the case of the party taking the appeal; and the court shall make such order for the payment of the costs accruing upon the appeal as may seem equitable and just.

(1) **Old sections**.— This section corresponds to old §§ 2252, 2253 and 2254 R. S. (repealed). § 2259 (repealed) provided that there should be no appeal by the condemning cor-

poration. The code section above allows such appeal to Common Pleas Court.

(2) **Interest**.— In a new proceeding after possession taken by

condemning corporation and reversal of first proceeding the jury may include in the compensation, interest on the amount due, from the time of taking possession. *Ry. Co. v. Koblentz*, 21 O. S. 334.

**When compensation payable.**—Owners of land taken for public purposes may waive the right to immediate payment. *State v. Irvin*, 12 Dec. 330.

§ 22. [Neglect to pay or take possession in six months.]<sup>1</sup>

When a municipal corporation makes an appropriation of property, and fails to pay for or take possession of the same within six months<sup>2</sup> after the assessment of compensation shall have been made, its right to make such appropriation on the terms of the assessment so made shall cease and determine, and any lands so appropriated shall be relieved from all incumbrance on account of any of the proceedings in such case, and the judgment or order of the court directing such assessment to be paid shall cease to be of any effect, except as to the costs adjudged against the corporation, and upon motion of any defendant, said costs may be retaxed, and a reasonable attorney's fee be paid to the attorney of such defendant, which, together with any other proper expenses incurred by such defendant, may be included in such costs.<sup>3</sup>

(1) **Old section.**—This section corresponds to § 2260 R. S. (repealed). § 2261 R. S. making the chapter applicable to hamlets is repealed and there is no corresponding provision in the code.

(2) **When time begins to run.**—Time commences to run from the entry of the judgment or order directing the assessment to be paid and not from the rendition of the verdict. *Ryan v. Hoffman*, 26 O. S. 109.

(3) **Owner's remedies.**—If the corporation takes possession after the expiration of the six months intending to proceed under the appropriation proceedings, the land owner may elect either to sue for the amount awarded him in the appro-

priation proceedings or have damages assessed at the time possession is taken. But having elected to sue for the amount awarded in the appropriation proceedings he is entitled to interest only from the time possession was taken. *Toledo v. Groll*, 2 C. C. 199. (Affirmed Sup. Ct. 23 B. 220.) *Webber v. Toledo*, 3 C. C. (N. S.) 319; 23 C. C. 237.

Where city appropriates and takes possession of property, but does not pay the compensation the owner cannot maintain ejectment but must sue for compensation. *Webber v. Toledo*, 3 C. C. (N. S.) 319; 23 C. C. 237.

A corporation cannot be compelled by mandamus to take possession of the land and pay the compensation

on its refusal to do so. *State v. R. R. Co.*, 17 O. S. 103.

**Waiver by acceptance of deposit.**—The land owner is not bound to accept the compensation, deposited after the six months, but if he does so he waives strict compliance with the statute. *Cincinnati v. Hosea*, 19 C. C. 744 (affirmed 66 O. S. 687). And in such case the owner cannot demand interest on the fund deposited. *Ib.*

Land owner may waive his rights to have the property after the expiration of the six months and by accepting the compensation, ratify the proceedings. *Ryan v. Hoffman*, 26 O. S. 109.

**When owner's right barred.**—The right of the owner whose property has been appropriated and, after six months, taken possession of, but not paid for, is not barred by the statute of limitations in less than 21 years. § 4981 R. S., the six years' statute, is not applicable. *Webber v. Toledo*, 3 C. C. (N. S.) 319; 23 C. C. 237.

**Who may sue.**—Conveyance by the land owner of property condemned, carries with it the right of action for taking it after the expiration of the six months. *Clarke v. Cleveland*, 9 C. C. 118.

The devisee of a testator who owned part of the property condemned, and to whom the remainder was conveyed after the appropriation, but before possession taken, has the right to maintain an action for amount assessed in the appropriation proceedings where the corporation has failed to take possession within the six months. *Webber v. Toledo*, 3 C. C. (N. S.) 319; 23 C. C. 237.

**Refusal by corporation before six months expires.**—A municipal corporation may waive its right to take property condemned, before the expiration of the six months and in

such case if the waiver is determined to have been made the corporation must pay attorney fees, etc., as required in case of failure to take after the six months. *Andrews v. Hyde Park*, 20 C. C. 278.

A motion to retax costs in such case does not come within § 5357 R. S. providing that "the motion to vacate a judgment because of its rendition before the action stood regularly for trial can be made only in the first three days of the succeeding term." *Ib.*

**Dismissal of proceedings.**—Proceedings to appropriate by a municipal corporation may be dismissed by the city solicitor with or without the direction of the legislative board of the city, but in case of such dismissal, the city must pay counsel fees and other expenses deemed just by the court, to the property owners. *Cincinnati v. Thrall*, 6 N. P. 158.

**Proceeding under invalid law.**—Where the municipal corporation has sought to take property under a law, declared unconstitutional and because of the unconstitutionality has been prevented from taking the property, it is not liable to pay counsel fees, etc., as in case where it fails to take possession within six months after a valid appropriation. *Hyde Park v. Grant*, 6 N. P. 471; (in Supreme Court, 47 B., 831; 67 O. S. 166).

But the claim for attorney's fees, etc., cannot be defeated on the ground that the appropriating ordinance was invalid. *Andrews v. Hyde Park*, 20 C. C. 278.

**No bar to new proceedings.**—The failure to pay and take possession within the six months is no bar to a new proceeding to appropriate the same property by the same corporation, after the expira-



tion of the six months. Trustees of Southern Ry. v. Haas, 42 O. S. 239.

**Character of taking after six months.**—Where a city takes possession by paying compensation *after* the six months, it gets title by appropriation and not by purchase. Ryan v. Hoffman, 26 O. S. 109, 122.

**Section applies to damages for change of grade.**—Former § 2260 R. S., to which the present section corresponds, was held applicable to application to assess damages to abutting property owners for change of grade or other improvements. Toledo v. Jacobson, 11 C. C. 220 (aff'd 38 B. 248).

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## SECOND. SALE OR LEASE OF PROPERTY.<sup>1</sup>

**Sec. 23. [Lease or sale of corporate property.]** All municipal corporations shall have power to sell or lease any real estate or to sell any personal property belonging to the corporation, when such real estate or personal property is not needed for any municipal purpose.<sup>2</sup>

(1) **Old sections.**—These provisions relating to the sale or lease of property correspond to chapter 16, division 8, title 12, R. S., §§ 2673 to 2675-10 R. S. inclusive, of which §§ 2673-2675 inclusive, 2675-5, and 2675-10 are repealed. Former sections 1552 and 1692 (paragraph 34) R. S. (repealed) also gave the municipality the power to sell.

**Other Code provisions.**—Sec. 7, (paragraph 26) of the Code, gives municipalities the right to sell or lease real estate. But though the power is given in general terms there, its exercise would be limited by the special provisions of this and subsequent sections. See Kerlin Bros. v. Toledo, 20 C. C. 603.

As to passage of ordinance for sale or lease of property, see § 122 of the Code.

(2) **Scope of power—Generally.**—As a general rule, a corporation, if not restrained by its charter may dispose of any property which it has

a right to acquire. Newark v. Elliott, 5 O. S. 114; Reynolds v. Stark County, 5 O. 204.

Land under a bridge used by the city for support to the bridge and not used as a street, may be leased by the city for any purpose not inconsistent with its use as a support for the bridge. Ricard Boiler & Engine Co. v. Toledo, 25 C. C. 64.

**Sale on time.**—Authority to sell on terms satisfactory to a municipal board, gives power to sell on time. Cincinnati v. Dexter, 55 O. S. 93; Reynolds v. Stark County, 5 O. 204.

**Sale of gas plant.**—Sale of its gas plant is within the power of a municipality under a provision authorizing it to sell real or personal property not needed for its use. Thompson v. Nemeyer, 59 O. S. 486.

**Property acquired for specific purpose.**—Where the municipality acquired property for a specific and limited purpose, it cannot be authorized to sell such property as against

the reversioner. *Board v. Edson*, 18 O. S. 221.

Where land is given to a municipality for corporate purposes, or where the land is acquired by purchase, the municipality may dispose of it as individuals might. *Reynolds v. Stark County*, 5 O. 204; *Le Clerq v. Gallipolis*, 7 O. (pt. 1) 218; but where the corporation takes as a trustee, to hold for prescribed uses, the *cestui que trust* retains a vested estate, the enjoyment of which will be protected in equity. *Le Clerq v. Gallipolis*, 7 O. (pt. 1) 218.

**Conveyance by city—Effect.**—

A deed by a municipal corporation for the conveyance of property, passes the legal title to the purchaser, although the consideration expressed is far below the value of the property or merely nominal. *Newton v. Mahoning Co.*, 26 O. S. 618.

As to when court will interfere because of insufficiency of price, see *Kerlin Bros. v. Toledo*, 20 C. C. 603.

When the contract whereby the grant is conveyed contains the elements of a valuable consideration as where the grantee surrendered the right to operate a ferry between certain points, in consideration of wharf and boat landing privileges, equity cannot be invoked to amend the contract or revoke the grant without an offer to restore the rights parted with when the contract was executed. Whether the grant amounted to an easement or a mere license, it is irrevocable when executed. *Cincinnati v. Bridge Co.*, 20 C. C. 396.

**Form.**—As to the manner in which a municipal corporation should execute a deed, see *Tiffin v. Shawhan*, 43 O. S. 178.

**Sec. 24. [Lease or sale of real estate; procedure.]**<sup>1</sup> No contract<sup>2</sup> for the sale or lease of any real estate shall be made unless authorized by an ordinance, approved by the votes of two-thirds<sup>4</sup> of all members elected to the council, and by the board<sup>5</sup> or officer having supervision or management of such real estate, and when such contract is so authorized, it shall be made in writing<sup>6</sup> by the board or officer having such supervision or management and only with the highest bidder,<sup>7</sup> after advertisement once a week for five (5) consecutive weeks<sup>8</sup> in a newspaper<sup>9</sup> of general circulation within the corporation, provided that such board or officer may reject any or all bids and readvertise until all such real estate is sold or leased, as the case may be;

[**Procedure for sale or lease of site for passenger railroad station.**] provided, that whenever any city owns real estate suitable for the location of a passenger railroad station, and council shall by ordinance declare that it is necessary that such

land be devoted to such use, it shall be competent for such city to sell or lease or exchange such land to such railroad or railroads for such purpose in the following manner: An ordinance authorizing and directing the mayor of the city to deed or lease the land shall be passed; council shall fix in such ordinance by metes and bounds the amount of land to be sold, leased or exchanged, the quantity of interest sold, leased or exchanged, and the consideration to be paid or exchanged therefor by such railroad or railroads, and in such ordinance shall call thereon a special election, to be held upon a day fixed by said ordinance not less than thirty (30) days from the passage thereof, and a majority of all the votes cast on such proposition shall be necessary to its ratification, and when so ratified, said ordinance shall be effective, and the mayor shall proceed to execute a deed of conveyance or lease of said property as therein provided, and in holding such special election, the provisions of section 2837, Revised Statutes, shall apply. [1906, April 14, 98 v. 165.]

(1) **Old sections.**—Compare old sections 2673 and 2673a R. S. (repealed).

(2) **Strict construction.**—The formalities required by the statutes for the sale of property of a city must be strictly complied with. *Kerlin Bros. v. Toledo*, 20 C. C. 603.

*No estoppel against municipality.*—A contract by a city which is void because bids were not first advertised for, imposes no liability on the city. *Wellston v. Morgan*, 65 O. S. 219.

No estoppel from the acts of the city officers can arise to cure an omission to advertise. *Lancaster v. Miller*, 58 O. S. 558.

**Bids**—*Construction.*—A bid in response to an advertisement for sale of natural gas plant, making one offer for the part of the property outside the city, another offer for the part within the city and a

third offer for both taken together, constitutes in reality three bids, and a sale of the outside property based on the first offer is not invalidated by a condition attached to the last offer. *Kerlin Bros. v. Toledo*, 20 C. C. 603.

*Insufficiency of price.*—To authorize a court to interfere with the action of a city council in a sale of the property of the city on the ground of the insufficiency of the price, the price received must have been so much less than would probably be obtained by again offering the property that it might be said by all men of fair judgment that the acceptance of the bid amounted to a reckless and improvident act. *Kerlin Bros. v. Toledo*, 20 C. C. 603.

*Bidding in general.*—See notes under §§ 59 and 143 of the Code.

(3) **Real estate.**—As to what



property comes within the terms "real estate" as used in a section such as this, see *Kerlin Bros. v. Toledo*, 20 C. C. 603. The term is broader as here used than it is under the general definition of the law. *Ib.*

Council must proceed under this section where part of the property sold is real estate, and it is sold as an entirety. See *Kerlin Bros. v. Toledo*, 8 N. P. 62.

(4) **Two-thirds vote.**—As to what would satisfy the requirements of the statute, relative to "votes of two-thirds of all members elected to Council," see *State ex rel. v. Orr*, 61 O. S. 384; *Guernsey Co. v. Cambridge*, 7 C. C. 72.

(5) **Concurrence of board.**—Under the present statute, the sale of city property cannot be made by Council, without the concurrence of the board or officer having the property in charge. As to this matter under former statutes, see *Kerlin Bros. v. Toledo*, 20 C. C. 603; *Newton v. Mahoning Co.*, 26 O. S. 618.

(6) **Manner of executing a conveyance** by a municipal corporation. See *Tiffin v. Shawhan*, 43 O. S. 178; *Young v. Mahoning Co.*, 7 O. F. D. 324.

(7) **Highest bidder.**—Under this wording of the law, the contract for sale must be made with the highest bidder. (See *Beaver v.*

*Blind Asylum*, 19 O. S. 97; *Boren v. Darke County*, 21 O. S. 311), unless the board exercise its power to reject bids. As to enforcement of right of bidder by mandamus, see same cases.

(8) **Provisions as to advertising** for bids are designed for the protection of the tax payer and are peremptory. *Uppington v. Oviatt*, 24 O. S. 232.

And advertisement for less than the statutory period would render the sale void. *McCloud v. Columbus*, 54 O. S. 439.

As to what length of time of publication is necessary to fulfill the requirement "once a week for five consecutive weeks" see *Early v. Doe*, 16 How. (U. S.) 610; *Fenner v. Cincinnati*, 8 N. P. 342; *Gillfillan v. Koke*, 1 W. L. M. 704; *Harmon v. Whittemore*, 1 B. 109.

(9) **Newspaper.**—The requirement of publication in a newspaper of general circulation does not forbid additional publications in other papers. This is not a squandering of funds. *Wasem v. Cincinnati*, 2 C. S. C. R. 84.

Publication in a newspaper means publication in the English language, in the absence of provisions to the contrary. *Cincinnati v. Bickett*, 26 O. S. 49. The publication is legal although the newspaper is published only on Sunday. *Hastings v. Columbus*, 42 O. S. 585

## ORDER OF PROCEDURE IN SELLING OR LEASING REAL PROPERTY OF MUNICIPALITY.

1. *An ordinance by council*, two-thirds of all members concurring, authorizing the sale or lease.

2. *Approval of this ordinance* by proper board or officer, and by the mayor.

3. *Advertisement*, inviting bids for the purchase or lease of the property.

4. *Deed or lease* conveying the property sold or leased.

Note.—The steps contemplated to be taken under § 24 above, are not

definitely set out. It seems clear that there are two essential acts required to be taken to consummate the sale of property, viz., first, the legislative determination to sell; and second, the carrying out of that determination by the executive or administrative department. Council, with the approval of the board or officer having charge of the property to be sold, finding the property not needed for municipal purposes, authorizes the contract for its sale to be made with the highest bidder upon advertisement. The passage of this ordinance completes the legislative step in the sale. The advertising, or rejection of bids and readvertising, and the execution of the deed, are left entirely to the board or officer having charge of the property, and council cannot control the exercise of these powers, unless, of course, council should repeal its ordinance at some time before the sale authorized to be made is consummated. The steps set out here would seem to satisfy all the requirements of the section, and the forms which follow doubtless would be a sufficient compliance with it. It will be noticed that in the form of deed given provision is made for the signature of the mayor and the affixing of the corporate seal of the municipality by that officer. The section of the code above does not explicitly require either the seal or the mayor's participation in the sale, but since § 1745, R. S., which is not repealed by the code and which is not inconsistent with any of its provisions, makes the mayor the custodian of the corporate seal, and since the proper method of conveying real estate by a municipal corporation is over its corporate seal, the forms here given provide for such signature and seal. (See Dillon on Municipal Corporations, § 581; City of Tiffin v. Shawhan, 43 O. S. 178, 185; Newton et al. vs. Commrs., 26 O. S. 618, 622.) It will be noticed also that the form of deed given below does not contain a general warranty. A warranty deed may of course be given.

#### FORM OF ORDINANCE FOR SALE OF REAL ESTATE BY MUNICIPALITY.

##### An Ordinance No.....

Authorizing the sale of (here insert general description of property) not needed for any municipal purpose.

Be it ordained by the council of the city [or village] of....., State of Ohio, two-thirds of all members elected thereto concurring,

Sec. 1. That the following described real estate belonging to the city [or village] of....., is not needed for any municipal purpose, to-wit:

(Here insert legal description of property to be sold.)

Sec. 2. That the..... (naming the board or officer having the supervision or management of the property to be sold) be and hereby is authorized to sell said real estate to the highest bidder according to law, upon the following terms: (Here insert terms of payment, whether cash or otherwise) and the said..... (naming the board or officer) and the mayor of the city [or village] are hereby authorized to convey said

**real estate by deed** (here add, if desired, the words "of general warranty") to the highest bidder therefor according to law.

Passed....., 19.....

Attest·

.....  
President of Council.

.....  
Clerk.

(This ordinance must be approved by the board or officer **having** the supervision or management of the real estate to be sold and must also be presented to the mayor for his approval as other ordinances. As to **pas-**sage under suspension of rules see § 122, of the code.)

### FORM OF ADVERTISEMENT FOR BIDS.

#### LEGAL NOTICE.

Notice is hereby given that sealed bids will be received at the **office of** the..... (here insert name of the board or officer **having** supervision or management of the real estate to be sold) until 12 o'clock noon on the.....day of....., 19...., (this day should be not less than five full weeks from the first advertisement) for the purchase of the following described real estate: (Here insert legal description of property to be sold.)

Said property is to be sold and conveyed to the highest bidder (here insert the words "by general warranty deed," if so specified in the ordinance) upon the following terms: (Here insert terms of payment specified in the ordinance.)

The right is reserved to reject any and all bids.

.....

Clerk of Board [or officer].

.....  
(To be signed by the officer, or by the president of the board, having supervision or management of the real estate to be sold.)

### FORM OF DEED BY MUNICIPAL CORPORATION.

KNOW ALL MEN BY THESE PRESENTS, That whereas, on the..... day of....., 19....., the council of the city [or village] of ....., State of Ohio, passed a certain ordinance, two-thirds of all members elected thereto concurring, authorizing the sale of the real estate hereinafter described, and,

Whereas, pursuant to said ordinance, advertisement was had in a newspaper of general circulation in said city [or village] for five consecutive weeks, inviting sealed bids for said real estate, and,

Whereas, at the time fixed in said advertisement for the receipt of said bids, .....presented his certain bid for said real estate,



which was the highest bid therefor, and which said bid has been duly accepted,

Now, therefore, pursuant to the premises, the said city [or village] of ....., State of Ohio, by....., its mayor, and....., its..... (here insert title of officer or of the president of the board having charge of the property conveyed), in consideration of..... dollars to it paid by....., the receipt of which is hereby acknowledged, does hereby grant, bargain, sell and convey unto the said ....., his heirs and assigns forever, the following described real estate, situate in the city [or village] of....., in the county of ....., and State of Ohio, to-wit: (here insert legal description of real estate conveyed), with all the privileges and appurtenances thereunto belonging, to have and to hold the same to the grantee, his heirs and assigns forever, as fully and completely as said city [or village] acting by its officers as aforesaid, by virtue of the proceedings hereinbefore set forth, may, can or should convey the same. (Covenants of general warranty may be added if authorized.)

In witness whereof, the said city [or village] of....., by its said officers, has hereunto caused to be affixed its name and corporate seal, and the names of its said officers, and the attestation of the Clerk of said city [or village], this....day of....., 19....

(Seal of city or village.)

The city [or village] of.....,

Attest:

by.....,

Mayor.

.....,

Clerk.

(Officer or President of Board.)

Signed, sealed, acknowledged and delivered in presence of:

.....

.....

(Witnesses.)

State of Ohio, County of..... ss.:

On this.....day of....., 19...., before me, a.....in and for said county, came....., Mayor of the city [or village] of....., State of Ohio, and....., the..... (here insert title of officer or of the President of the Board having charge of the real estate conveyed), and severally acknowledged the execution of the foregoing deed to be their voluntary act on behalf of the city [or village], and the corporate act and deed of said city [or village]. Also came..... Clerk of said city [or village] and acknowledged the attestation of the foregoing deed to be his voluntary act and deed as such Clerk.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal the day and year last aforesaid.

.....

(Title of officer taking acknowledgment.)

(The forms for lease of property by the municipality may be adapted from the above.)

**Sec. 25. [Sale of personal property.]** Any personal property not needed for municipal purposes, the estimated value of which is less than five hundred dollars, may be sold by the board or officer having supervision or management of the same; provided, that where the estimated value of such property exceeds five hundred dollars it shall be sold only in the manner herein provided for the sale or lease of real estate.<sup>1</sup>

(1) **Forms.** — See notes and forms under § 24, *supra*.

**Sale by piecemeal.** — As to whether division into parts may be made of personal property to be sold

at one time, so that the estimated value of the part sold will be less than \$500, see *Lancaster v. Miller*, 58 O. S. 558, 573.

**Sec. 25a. [Sale of refuse, street sweepings, etc.; disposition of money arising therefrom.]** Any refuse, street scrapings, or ashes not necessary for the improvement of municipal property, and other personal property in charge of the street cleaning department no longer necessary for the purposes of said department shall be sold, in the manner provided by law for the sale of other personal property, by the board or officer having the supervision or management of the said department. The money arising from such sale shall be deposited in the treasury in the street cleaning fund and shall be immediately available, in addition to any appropriation by council, for the current expenses of the street cleaning department, and may be withdrawn from the treasury upon the warrant of the city auditor for said purpose. Said money shall not be considered a source of revenue subject to appropriation by council, and may be expended as herein provided without having been appropriated by council. [1906, March 7, 98 v. 43.]

**Sec. 26.** [Disposition of money arising from sale or lease of corporate property.]<sup>1</sup> The money arising from the sale or lease of any real estate, or public building, or from the sale of any personal property belonging to the corporation shall be deposited in the treasury in the particular fund by which such property was acquired, or is maintained, if there be such fund, and if there be no such fund then it shall be deposited in the general fund; provided, however, that where such property was acquired by an issue of bonds the whole or any part of which issue is still outstanding, unpaid and unprovided for, then such money, after deducting therefrom the cost of maintenance and administration of such property, shall on warrant of the city auditor be transferred to the trustees of the sinking fund to be applied in the payment of the principal of said bond issue. [1904, April 27, 97 v. 516.]

(1) **Old section 2674 R. S. repealed.**

**Sec. 27.** [Statutes re-enacted.] In the sale, exchange or transfer of the property herein described §§ 2675-1, 2675-2, 2675-3, 2675-4,<sup>1</sup> 2675-6, 2675-7, 2675-8 and 2675-9, of the Revised Statutes of Ohio shall be and remain in full force and effect.

(1) § 2675-5 was a special act and is repealed.

**Sec. 2675—1 R. S.** [Exchange of lots for school purposes authorized.] § 1. In any and all cases when any lot or lots of land lying within the limits of any town or village shall have been dedicated, given, or granted to such town or village, and set apart for the use and support of schools, it shall be competent for the several Courts of Common Pleas of this state, on application of the mayor or council of any village, where such lot or lots are situate, to authorize an exchange of such lot or lots for such other lot or lots within the limits of such village as the interest of the schools therein may seem to require. And



all lots taken in exchange as aforesaid, shall be held for the same purposes and subject to the same conditions as the original lots dedicated, given or granted to said town or village for the use and support of schools. [70 v. 193.]

**Sec. 2675—2 R. S. [Terms of application for exchange.]**

§ 2. That every application for an exchange of lots as aforesaid, shall be by petition verified by the mayor, and the board of education of said town or village shall be made a party defendant, and such other persons as the court may order, and shall set forth an accurate description of each and all lots proposed to be given or taken in exchange, and shall set forth the specific circumstances which render such exchange necessary, and a prayer for such order as may be required. [70 v. 193.]

**Sec. 2675—3 R. S. [Notice thereof to be published.] § 3.**

That notice of the filing, pendency, and prayer of such petition shall be published for four consecutive weeks, prior to the day of hearing, in some newspaper printed in such village, if there be any printed therein, and if there be not, in some newspaper printed in the county, and of general circulation in such village. [70 v. 193.]

**Sec. 2675—4 R. S. [Consummation of the exchange.] § 4.**

If upon the hearing of such petition it shall appear to the court that notice of the filing, pendency, and prayer of such petition has been given as hereinbefore required, and that such an exchange of lots is necessary and will promote the interests of schools in such village, and that such an order would not be inconsistent with the terms and conditions of the original grant or devise, then the court shall authorize such exchange to be made, and order the mayor of such village to execute and deliver such deed or deeds in fee simple as may be necessary to effect such exchange. [70 v. 193.]

**Sec. 2675—6 R. S. [Who may sell railroad stocks owned by county, city, or township.] § 25.** The commissioners of any county, the city or town council of any city or town, and the trustees of any township, which county, city, town or township has heretofore subscribed to the capital stock of any railroad company, or turnpike or plank-road company, and has issued, or shall hereafter issue any bonds for the payment of such subscription, are hereby authorized to sell the said stock, or any part thereof, and on such terms as they shall deem to be for the interest of said county, city, town or township, respectively, and may apply the proceeds of such sale to the payment of the bonds of such county, city, town or township, respectively sub-

scribed; *provided*, that the commissioners of any county; the city or town council of any city or town, and the trustees of any township, which has paid in full its subscriptions to such railroad or turnpike or plank-road company, shall be authorized to sell the stock of the same in such railroad company, or turnpike or plank-road company, on such terms as they shall deem to be for the interest of said county, city, town or township respectively, and place the proceeds of such sale to the credit of the general fund of such county, city, town or township. [1867, April 16: 64 v. 234; 50 v. 274.]

**Sec. 2675—7 R. S. [How proceeds of sale of stocks owned by city, county, or town applied.]** § 1. Whenever the commissioners of any county, the proper authorities of any city, or town, or the trustees of any township, shall sell stock of any railroad, turnpike, or plank-road company, under the provisions of the act to which this act is supplementary, they shall apply the proceeds of said sale to the payment of the bonds issued to said railroad, turnpike, or plank-road company, for said stock so sold as aforesaid, if said bonds can be obtained at par. [60 v. 53.]

**Sec. 2675—8 R. S. [Same.]** § 2. If said bonds can not be redeemed at par, said authorities so selling the stock as aforesaid, shall invest said money in the bonds and stocks of the United States, or of this state, or upon bond and mortgage upon unencumbered real estate, held in fee simple in said county; and said loan not to exceed one-half of the appraised value of the property so mortgaged, to be held as a fund for the payment of the bonds given for said stock, when the same shall mature, or can be paid and discharged at their par value; the principal and interest of all money so invested shall be held exclusively as a fund for the payment of the principal and interest of the bonds so given for the stock so sold, and shall be applicable to no other purpose until said indebtedness shall be fully paid. [60 v. 53.]

**Sec. 2675—9 R. S. [Counties, townships, and municipalities authorized to sell stocks owned in private corporations.]** § 1. The trustees of any township, city councils and county commissioners are hereby authorized and empowered to sell and dispose of any railroad stocks, plank-road stock, and turnpike stock, owned by said township, municipal corporations or county, at public or private sale, as they may deem best, and pay the proceeds arising from the sale thereof into the treasury of said township, municipality or county, to the credit of the general fund thereof. [85 v. 143.]

## THIRD. STREETS AND THEIR USE.

(a) *Control of Streets.*

**Sec. 28.** [Council to have control of streets, etc.]<sup>1</sup> In all municipal corporations council shall have the care, supervision and control of public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts and viaducts within the corporation, and shall cause the same to be kept open and in repair and free from nuisance;<sup>2</sup> and with respect to the dedication, opening and vacation of streets, as well as labor upon them, sections 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2649-1, 2649-2, 2649-3, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2660, 2661, 2662, 2664, 2664-1, 2664-2, 2664-3, 2664-4, 2664-5, 2664-6, 2664-7, 2664-8, 2664-9, 2664-10, 2664-11, 2664-12, 2664-13 and 2664-14 shall be and remain in full force and effect.

(1) **Old section 2640 R. S. (repealed.)**

(2) **Scope of words used.**—*Highway* is a generic name and means a thoroughfare open to all people. *Sullivan v. Columbus*, 12 Dec. 650.

**Roads in municipal limits.**—Public highways over which council has control, would include part of pike within limits of municipality, although county commissioners may also have power to improve this part. *Commissioners v. State*, 50 O. S. 653, 658; and the commissioners would have this power under the two-mile-pike act. *Lewis v. Laylin*, 46 O. S. 663; see also *State v. Craig*, 22 C. C. 135; *State ex rel v. Lewis*, 13 Dec. 188.

These terms would also include a public roadway connecting with

streets of a city, coming within limits of a municipality as part of territory annexed, if it continues to be used as a street, although never accepted and confirmed by ordinance. *Steubenville v. King*, 23 O. S. 610; and generally roads brought within a city by annexation would be included. *R. R. Co. v. Defiance*, 10 C. C. 27, 32; 52 O. S. 262; *C. C. & W. Tp. Co. v. Trac-tion Co.*, 15 Dec. 118; 2 N. P. (N. S.) 237.

Where under statutes in force in 1868 contiguous territory was attached to a municipal corporation for road purposes, it was held the municipal street commissioner might enter upon and take materials for road repair from lands near such road but not in the same road district. *Burrows v. Cosler*, 33 O. S. 567.

*Bridges, etc., constructed by*



county.—“Bridges, viaducts, etc.,” would include a bridge constructed by county commissioners within limits of a municipality. *Newark v. McDowell*, 16 C. C. 556.

And this is true, even though the municipality was not entitled to receive any part of the bridge fund levied therein. *Piqua v. Geist*, 59 O. S. 163; and though the county had no authority to construct the bridge. *Newark v. Jones*, 16 C. C. 563.

They would include a viaduct constructed by county commissioners within a city, under statute authorizing such construction. *State ex rel. v. Cincinnati*, 4 N. P. 313.

As to the power of county commissioners over bridges within the limits of municipalities, see *Com'rs v. Ry. Co.*, 45 O. S. 401; *State v. Com'rs*, 49 O. S. 301, 304; *Jones v. Franklin Co.*, 25 C. C. 510.

The general provision of old § 2640 R. S. was held to be qualified by § 860 R. S., which required county commissioners to keep in repair bridges except those wholly within the municipality where such municipality had the right to receive a portion of the bridge taxes levied therein and also by § 4938 R. S., which imposed upon the commissioners the repair of bridges in cities not having a right to receive a part of the bridge fund levied therein. *Dayton v. Harmon*, 12 C. D. 574. See also *State ex rel. v. Carlisle*, 15 Dec. 165; 2 N. P. (N. S.) 627.

*Street defined.*—A street over which council has control, includes the surface with so much of what underlies it as is requisite for all street uses known to the period in which the street is occupied, not merely for travel, but for sewerage, gas pipes, etc., within whatever depth is necessary and proper, and as much of the space above the

street as is necessary for the proper use of the street as a highway. *Henry v. Cincinnati*, 25 C. C. 178; 1 C. C. (N. S.) 289.

*Land under city bridge used by the city as support for abutments of the bridge*, which the city had not invited the public to use as a highway, and which was not adapted for that purpose, is in no sense a public street, and city may lease such property for any purpose not inconsistent with its use as a support for the bridge. *Ricard Boiler & Engine Co. v. Toledo*, 25 C. C. 64.

**Character of municipality's title.**—The fee of the streets is in the municipality, in trust for street purposes. *St. Ry. v. Cummins ville*, 14 O. S. 523; *Columbus v. Agler*, 44 O. S. 485; *Callen v. Elec. Light Co.*, 66 O. S. 166; *Ham. G. & C. Traction Co. v. Parrish*, 67 O. S. 181, 190; *Butler v. Cincinnati*, 2 C. C. (N. S.) 377; *Wenzel v. St. Ry. Co.*, 14 N. P. 126; but see *Henry v. Cincinnati*, 1 C. C. (N. S.) 289; 25 C. C. 178. And this is true, although the street became such by annexation of territory embracing a county road. *Akron & C. F. Rapid Transit Co. v. Erie Ry.*, 28 C. C. 36; 7 C. C. (N. S.) 199.

The municipal corporation is an agent of the state in the preservation of public rights in the streets and its ownership is of the fee subject to the right of the state to direct the mode of administering such trust and of keeping the streets in repair and free from nuisance. *Raynolds v. Cleveland*, 2 C. C. (N. S.) 139; 24 C. C. 215.

*Acquisition from state.*—The transfer to a city for street purposes, by the state, of property acquired for canal purposes, gives the control to the city without making a reversion in favor of the owner of the soil. *Malone v. Toledo*, 28 O. S. 643.

**Compensation for use of streets.**—Revenues for the use of the streets by vehicles in general is held to be a license fee for the spe-

cial burden imposed and not a tax upon property. *Marmet v. State*, 45 O. S. 63, 68.

Under the statute, § 3461 R. S., providing for the use of streets by a telegraph or telephone company, it was held that "a municipal corporation, though holding the title to its streets, has no private proprietary interest in them which entitles it to compensation when they are subjected to an authorized additional public burden by the construction of a telephone line therein. But being charged with the duty of keeping the streets under its control in repair, it may be allowed compensation to an amount sufficient to make the repairs rendered necessary by such additional use." *Zanesville v. Telegraph and Telephone Co.*, 64 O. S. 67, 81.

As to right to exact a revenue from gas company using the streets, see *Columbus v. Columbus Gas Co.*, 15 Dec. 645; 3 N. P. (N. S.) 293.

As to revenue from use of streets by street railways, see *Cincinnati St. Ry. Co. v. Smith*, 29 O. S. 291, 306.

**Power of council over use of streets.**—The power is limited only by the rule that it holds the streets in trust for the public for purposes of travel. *Ry. Co. v. Elyria*, 14 C. C. 48; *Transit Co. v. Hamilton*, 1 N. P. 366.

It may authorize any use of a street not subversive of or impairing the original use, but the rights of the public to use it as a street, and of the adjacent lot owner to enjoy it as a means of access to his property, must not be materially interfered with. *Branahan v. Hotel Co.*, 39 O. S. 333.

Council has discretion as to the manner in which streets shall be used, and this power cannot be judicially interfered with unless a manifest invasion of private rights is shown. *Mill Creek Valley R. R. Co. v. St. Bernard*, 8 N. P. 288, 294.

Council may provide by ordinance that all drivers shall keep to the right in passing over bridges within municipal limits. *Platt v. Toledo*, 6 C. C. (N. S.) 403.

It may by ordinance prohibit sales

at auction in the streets, and such ordinance would not be unreasonable nor in restraint of trade. *White v. Kent*, 11 O. S. 550.

It may summarily abate a nuisance erected upon a public street which interferes with the free use of the street by the public. *Evans v. Cincinnati*, 2 Handy, 236.

But hedges, shrubs, and herbage belong to the owner of the fee and cannot be summarily destroyed unless they interfere with public travel. *Phifer v. Cox*, 21 O. S. 248.

It may impose upon one who has been granted the privilege of temporarily obstructing a street for building on abutting property the duty to save the city from loss and travelers from injury. *Reuben v. Swigart*, 15 C. C. 565.

Municipality may grant franchise to street railroad to use a bridge within its limits although the bridge was built by the county. *State ex rel. v. R. R. Co.*, 19 C. C. 79, 90.

It may regulate the use of streets and sidewalks by bicycles and prohibit riding of bicycles on sidewalks, as well as fix by ordinance, restrictions on speed, use of bells, lights, etc. *Thomas v. Fremont*, 12 Dec. 604. Leading or pushing a bicycle is not within prohibitive words, "riding, driving, propelling, or operating." *Ib.*

It may improve and ornament a public square for health, public buildings or the transaction of public business of the people or for both the purposes of pleasure and business if there is no special limitation or use described by the dedication. *Langley v. Gallipolis*, 2 O. S. 107.

But the municipality cannot permit the permanent occupancy of the streets, cutting off access to the property of abutting lot owners for

the convenience and benefit of a private business. *Branahan v. Hotel Co.*, 39 O. S. 333.

It cannot surrender the street by permitting encroachments which lessen its width. *L. S. & M. S. Ry. Co. v. Elyria*, 69 O. S. 414.

It was held that a municipality cannot change the name of a street at will, without good cause, except on petition of abutting property owners. *Miller v. Cincinnati* 21 B. 121.

A section such as this gives the municipality no power to grant to a lighting company the power to erect poles in the street. *Brush Co. v. Jones Bros. Co.*, 5 C. C. 340, 341.

The power to improve streets in its own way, is not limited by the voluntary improvement of an abutting proprietor in a different way. *Parsons v. Columbus*, 50 O. S. 460; nor by an improvement of a street which is part of a road within the municipality, by a county, having this authority. *Mills v. Norwood*, 6 C. C. 305, 308.

The general authority of council over the streets, duly exercised, will override any license by which the control of the street has been surrendered to a company or individual. *Railroad Company v. Defiance*, 10 O. F. D. 480; 52 O. S. 262.

The power of council to authorize the tearing up of streets by street railway company or sewer contractor is not restricted because of a previous contract with the construction company to keep the street which the company has made in repair. *Union Savings Bank, etc., Co. v. Norwood*, 12 Dec. 623.

As to council's power over construction of sidewalks, see note under § 70 of the Code.

**Exclusive use.**—Council is without power to grant exclusive use of

its streets, unless expressly granted the power. *State ex rel. v. Gas Light & Coke Co.*, 18 O. S. 262; *Cincinnati Street Railway Co. v. Smith*, 29 O. S. 291; *State ex rel. v. Columbus Ry. Co.*, 24 C. C. 609, 623.

**Perpetual use** may be granted if no limitation of time in power given to municipality by legislature. *State ex rel v. Columbus Ry. Co.*, 24 C. C. 609, but see 73 O. S. 363.

#### Use granted to railroad.—

**Municipal control.**—Though a municipality has by ordinance authorized a railroad company to lay tracks in a street, its supervision of, and responsibility for the street continues subject only to the use of the company as authorized. *Steubenville v. McGill*, 41 O. S. 235; *Cincinnati v. Kirchner*, 13 Dec. 727; *Zanesville v. Fannan*, 53 O. S. 605; *Railroad Co. v. Defiance*, 52 O. S. 262; 167 U. S. 88; *L. S. & M. S. Ry. Co. v. Elyria*, 69 O. S. 414, 430. A municipality has no power to authorize permanent obstruction or encroachment upon the street which excludes the public from the use of that portion of the highway. *L. S. & M. S. Ry. Co. v. Elyria*, 69 O. S. 414; *Zanesville v. Fannan*, 53 O. S. 605; *Railroad Co. v. Defiance*, 52 O. S. 262. An agreement with a railroad company for an obstruction in the street that excludes the public can operate only as a license until public convenience requires its removal. *L. S. & M. S. Ry. Co. v. Elyria*, 69 O. S. 414.

Where a railroad company has the duty of maintaining a bridge as part of the street, and of keeping it in repair, the railroad company would have the same right as the municipality to close the bridge when it became dangerous to public travel. *Toledo Street Ry. Co. v. Mammet*, 13 C. C. 591.



As to rights of abutting owner to enjoin construction of railroad when his easement in street is interfered with, see "*Abutting Owner's Rights*," *infra*.

**Municipal liability.**—The duty of keeping the streets in repair and free from nuisance not being taken away by a grant of the use of the street to a railroad company, the municipality is liable to an abutting owner for damages caused by the railroad company to abutting property and not incidental to the ordinary construction of a railroad in the street, notwithstanding the railroad company may also be liable to the property owner. *Zanesville v. Fannan*, 53 O. S. 605. But see *Dillenbach v. Xenia*, 41 O. S. 207. Thus a municipality was held liable for obstruction to drainage caused by a railroad company. *Zanesville v. Fannan*, 53 O. S. 605. But the municipality is not liable for damages which are in the nature of compensation for an additional burden in the street arising from the location or construction of railroad tracks therein. *Zanesville v. Fannan*, 53 O. S. 605. A municipality is held liable for injury caused to person falling into a ditch between tracks of railroad in the street. *Steubenville v. McGill*, 41 O. S. 235.

As to rights of abutting owner against railroad company for damages, see note 2 under § 3283 R. S., page 683.

As to the statute of limitations in case of encroachment of abutments of a steam railroad in a highway, see *L. S. & M. S. Ry. Co. v. Elyria*, 69 O. S. 414, 435.

**What uses impose additional burdens.**—*Sewers.*—A sewer is an authorized use of a street. *Elster*

*v. Springfield*, 49 O. S. 82; *Cincinnati v. Penny*, 21 O. S. 499.

**Grading.**—Grading and changing of grade are authorized uses of streets. *R. R. Co. v. Defiance*, 52 O. S. 262, 300; 167 U. S. 88; *East End B. & C. Co. v. Cleveland*, 1 N. P. (N. S.) 493.

**Street railways** are not an additional burden on the street, see note page 143.

**Electric light poles and wires** in the streets at the curb, though with the consent of municipality, have been held to be a diversion of the street from the purposes for which it was dedicated, and an abutting owner injured thereby has been given the right to enjoin the same. *Callen v. Electric Light Co.* 66 O. S. 166.

**Telephone and telegraph poles** have been held an interference with abutting owner's easement. *Tannan v. Telegraph Ass'n*, 13 Dec. 730; 1 N. P. (N. S.) 81 (aff'd 71 O. S. 478); *Daily v. State*, 51 O. S. 348, 358, 364; *Mantell v. Telephone Co.* 20 C. C. 345; but see *Auerbach v. Telephone Co.* 7 N. P. 633; *Hayes v. Telephone Co.* 21 C. C. 480; see further *Zanesville v. Telegraph & Telephone Co.* 64 O. S. 67, 82.

**Gas pipes** laid longitudinally under sidewalk have been held an additional burden on the street. *Federal Gas & Fuel Co. v. Townsend*, 14 Dec. 5; 1 N. P. (N. S.) 289; *Webb v. Ohio Gas Fuel Co.* 16 B. 121.

**Conduits** for telephone and telegraph wires are additional servitude. *Burns v. Telephone Co.* 3 N. P. (N. S.) 257.

**Steam railroads** are an additional burden on the street, see note "*Abutting Owner's Rights*," *infra*.

**Abutting owner's rights.**—An owner of a lot abutting on a street

has a property interest in the street in front of his lot which cannot be taken except after payment or deposit of compensation. *Callen v. Electric Light Co.*, 66 O. S. 166; *Crawford v. Delaware*, 7 O. S. 459; *Street Ry. v. Cummins*, 14 O. S. 523.

An abutting owner may use the space above or below the surface of the street in any manner permissible by city ordinance where such use contravenes no right of the city to its actual use for street and municipal purposes. Such abutting owner may string a wire above the street eighty feet above the surface. *Henry v. Cincinnati*, 1 C. C. (N. S.) 289; 25 C. C. 178. But see *Butler v. Cincinnati*, 25 C. C. 772.

An abutting owner's easement in a street consists not only in having the surface free and unobstructed for ingress and egress, but he also has the right to light and air above the surface. *Lloyd Booth Co. v. Mahoning Co.*, 12 C. D. 706; and an obstruction to his light and air is an infringement on his easement in the street. *Hayes v. Telephone Co.*, 21 C. C. 480. So an erection of a viaduct in the street may be an injury to the easement, although it does not materially interfere with the surface use of the street. *Lloyd Booth Co. v. Mahoning Co.*, 12 C. D. 706.

Whether abutting owner's easement immediately in front of his lot extends only to center of street or all the way across street, see *Smedes v. Railroad Co.*, 4 O. L. R. 44; *Madden v. Railway Co.*, 21 C. C. 73.

An abutting owner's right to have the street kept open and free from nuisance may be barred by the lapse

of time. *Kuhn v. Cleveland*, 25 C. C. 272.

*Steam railroads in street—Injunction.*—An abutting owner may enjoin the construction of a railroad until the right to construct such road shall first be acquired. *Railway Co. v. Lawrence*, 38 O. S. 41; *Toledo Bending Co. v. Railway*, 2 N. P. 317; *Weber v. Electric Railway Co.*, 13 Dec. 194.

Even after ordinance to construct railroad in street is obtained, an abutting owner may enjoin such construction if it materially interferes with his access to his property, until his easement is properly appropriated or purchased. *Burial Case Co. v. Railway Co.*, 24 C. C. 107; 4 C. C. (N. S.) 365.

Where railroad track is not constructed on part of the street immediately in front of plaintiff's property, there is no such material interference with access as to constitute the taking of property and entitle the owner to enjoin the construction, even though the owner suffers in common with the public some inconvenience in travel along the street. *Mitchell Furniture Co. v. Railroad*, 7 N. P. 639 (aff'd 65 O. S. 571); *Herzog v. Railway*, 25 C. C. 702 (aff'd 74 O. S. —); *L. & N. R. R. Co. v. C. N. O. & T. P. Ry. Co.*, 3 N. P. (N. S.) 109; see also *Hatch v. R. R. Co.*, 18 O. S. 92.

But where the railroad obstructs the only means of access to his property, even though the track is not laid immediately in front of his lot, there is a taking of property rights and the construction may be enjoined. *Mitchell Furniture Co. v. Railroad*, 7 N. P. 639 (aff'd 65 O. S. 571).

A railroad trestle in the street was not enjoined where the street was unimproved and far below the established grade, and abutting owner would not be injured in future when the street was filled. *C. C. & St. L. Ry. Co. v. C. & I. W. Ry.* 15 Dec. 112; 2 N. P. (N. S.) 237.

The abutting owner cannot enjoin because the municipality might have a right to injunction. The municipality's rights cannot be worked out through an abutting owner, and *vice versa*. *C. C. & St. L. Ry. Co. v. C. & I. W. Ry. Co.*, 15 Dec. 112; 2 N. P. (N. S.) 237

As to right of abutting owner to damages from railroad company, for injuries due to construction of railroad in street, see § 3283 R S. and note (2) thereunder, p. 683.

*Street railways.*—As to rights of abutting owner where street railway is constructed in street, see generally title "Street Railways," page 142 *et seq.*

*City and county highway—distinction.*—Owner of land abutting on country highway has fee to the center of highway and public has easement, while owner of land abutting on city street has easement and public owns the fee, but in each situation the respective rights are substantially the same. *Callen v. Electric Light Co.*, 66 O. S. 166.

*Damages for injury caused by improvements.*—As to owner's rights for damages to his property caused by improvements, see § 54 of the Code and notes.

**No extraordinary use without consent of council.**—The care, supervision and control over streets and highways having been given to

council, none of these can be used for extraordinary purposes without the consent of council. *Illuminating Co. v. Mt. Gilead*, 8 N. P. 669.

But temporary obstructions in streets, such as are occasioned in rebuilding and repairing houses, are not prohibited and do not require special license. *Clark v. Fry*, 8 O. S. 358; *Columbus v. Penrod*, 73 O. S. 209; although council can regulate them, *Ib.*; and can impose the duty to save the city from loss and travelers from injury. *Reuben v. Swigart*, 15 C. C. 565.

Council is the only authority to give consent to the use of streets, and a direction assumed to be given by the mayor, without authority of council, is inoperative. *Ry. Co. v. Carthage*, 36 O. S. 631.

Where an ordinance grants to a gas company the right to lay its pipes in the streets, no special permit from the municipal authorities could be required. *Defiance v. Gas and Electric Co.*, 12 Dec. 424. Such a right cannot be revoked by the municipal authorities, and it includes the right to repair and extend the pipes. *Ib.*

As to powers of board of public service over streets, see § 140 and notes.

*Remedy.*—Obstructions in streets and highways constitute a nuisance and full power is conferred upon the State, by its attorney general, on his own behalf or on behalf of a party in interest, to invoke the equity powers of a court to have such obstructions removed. *Trumbull County v. Pennsylvania Co.*, 24 C. C. 550. See also *Little Miami Ry. Co. v. Greene Co.*, 31 O. S. 338; *State v. Railway Co.*, 36 O. S. 434.



**Adverse possession.**—It has been held that a municipality's rights in a street or public square may be lost by adverse possession by a private individual for more than twenty-one years where the possession is by a building or other permanent and substantial structure. *Cincinnati v. Presbyterian Church*, 8 O. S. 298; *Cincinnati v. Evans*, 5 O. S. 594; *Williams v. Presbyterian Society*, 1 O. S. 478, 510; *Lane v. Kennedy*, 13 O. S. 42, 46; *McClelland v. Miller*, 28 O. S. 488, 502; *Seese v. Maumee*, 7 C. C. (N. S.) 497. See also *Cincinnati v. Columbia*, 17 B. 192; *Railroad Co. v. Hambleton*, 40 O. S. 496.

But the erection of fences, planting of shade trees and like occupation of a part or all of a public street do not constitute such adverse possession as to bar the municipality. *Lane v. Kennedy*, 13 O. S. 42; *McClelland v. Miller*, 28 O. S. 488; *Heddleston v. Hendricks*, 52 O. S. 465; *Sullivan v. Columbus*, 12 Dec. 650; *Ashley v. Toledo*, 13 C. C. 9.

But, as to the case where fences and like unsubstantial structures exclude the public from the entire street, see *Mott v. Toledo*, 17 C. C. 472; *Seese v. Maumee*, 7 C. C. (N. S.) 497 (holding there is a distinction between encroachment on part of a street and entire occupation of street).

On the other hand, it has been held that since the encroachment on a public street by a permanent or other structure is a public nuisance, no right by adverse possession can be acquired by such an obstruction. *Elster v. Springfield*, 49 O. S. 82, 98; *Wright v. Oberlin*, 23 C. C. 509; *Heddleston v. Hendricks*, 52 O. S. 465; *Ry. Co. v. Elyria*, 69 O. S. 414; *Sullivan v. Columbus*, 12 Dec. 650; *Lawrence Railroad Co. v. Com-*

*missioners*, 35 O. S. 8; *Railroad Co. v. Commissioners*, 31 O. S. 338, 349. And whatever right against the municipality may be acquired by the encroachment upon the street with a permanent structure has been placed upon the ground of equitable estoppel of the municipality. *Lane v. Kennedy*, 13 O. S. 42, 46; *Elster v. Springfield*, 49 O. S. 82, 98; *Wright v. Oberlin*, 23 C. C. 509; *Sullivan v. Columbus*, 12 Dec. 650; *Winslow v. Cincinnati*, 6 N. P. 47; and see: *Mondle v. Toledo Plow Co.*, 6 N. P. 294; *Lane v. Kennedy*, 13 O. S. 42; *Mooren v. Cleveland*, 15 Dec. 456.

By section 6921 R. S. the obstruction of any public ground, highway, street or alley of a municipality by fences, buildings, structures or otherwise is made an indictable nuisance.

*Streets not opened and used.*—By section 4977 R. S. the whole or any part of streets which have been dedicated, but not opened or used by the public, may be lost by the municipality to abutting owner if fenced in and held for twenty-one years. See also *Stevens v. Shannon*, 6 C. C. 142; *Seese v. Maumee*, 7 C. C. (N. S.) 497.

**Abandonment.**—Municipality may lose its control over streets by abandonment. *State v. Railway Co.*, 53 O. S. 189. But abandonment of part of a street will not work an abandonment of all. *Cincinnati v. Kirchner*, 13 Dec. 727; 1 N. P. (N. S.) 93.

**Municipal liability — General principles.**—The rule of municipal liability would seem to be that the municipality is not liable for the *unlawful use* of its streets, but is liable for any *defects in their state or condition*. *Custer v. New Philadelphia*, 20 C. C. 177. And it is not

liable for failure to prevent a use of the streets by neglect to pass proper ordinances, or otherwise. *Ib.*

In exercising care and control over the streets the municipality acts as the agent of the State and is exempt from liability for failure or neglect to perform duties in that respect. *Robinson v. Greenville*, 42 O. S. 625; *Custer v. New Philadelphia*, 20 C. C. 177; *Zanesville v. Fannan*, 53 O. S. 605; *Wilhelm v. Defiance*, 58 O. S. 56, 65.

Thus a municipality is not liable for injury caused by fast riding of bicycles on its sidewalks because it has not forbidden the same by ordinance or otherwise. *Custer v. New Philadelphia*, 20 C. C. 177.

It is not liable for injury caused by disorderly persons discharging a cannon for several hours in the street. *Robinson v. Greenville*, 42 O. S. 625.

But the provision requiring the municipality to keep the streets open and in repair and free from nuisance implies a duty for the breach of which, to the injury of any one, the municipality is liable. See *Cleveland v. King*, 132 U. S. 295, 302; *Cardington v. Admr. of Fredericks*, 46 O. S. 442, 447; *Zanesville v. Fannan*, 53 O. S. 605; *Wilhelm v. Defiance*, 58 O. S. 56, 65; *Herrick v. Cleveland*, 7 C. C. 470; *Kleister v. Dayton, Ohio Dec. (Dayton)* 215; and it is liable even though the defect or obstruction arose from construction in accordance with plans for improvement adopted by municipal authorities. *Circleville v. Sohn*, 59 O. S. 285.

When the corporation is performing this duty it is acting in its proprietary capacity and its liability is largely, if not entirely, measured by the liability of an individual for similar acts. *Robinson v. Greenville*, 42 O. S. 625.

The law exacts from the municipality, however, only what is practicable and reasonable in regard to keeping its streets open and in re-

pair and free from nuisance. *Chase v. Cleveland*, 44 O. S. 505, 515; *Van Dyke v. Cincinnati*, 1 Disney 532; and it is not bound to anticipate improbable and unprecedented events, and provide against their possible results. *Village v. Kallager*, 52 O. S. 183; *Fremont v. Dunlap*, 69 O. S. 286.

It is only required to keep the streets in such condition that a person exercising ordinary care in passing over them, may be reasonably safe from injury arising from their condition. *Durbin v. Napoleon*, 21 C. C. 160.

Where a bridge or street is in a reasonably safe condition for travel in the ordinary mode, it is free from nuisance. *Cardington v. Fredericks, Admr.*, 46 O. S. 442; *Zanesville v. Fannan*, 53 O. S. 605; *Cincinnati v. Sohn*, 59 O. S. 285; *Cincinnati v. Fleischer, Admr.*, 63 O. S. 229; *Troy v. Brady*, 67 O. S. 65. Municipality is not liable as an insurer of those who go upon the streets. *Ib.*

But the liability of the municipality is not affected by the fact that the person who caused the nuisance which resulted in injury, is responsible over to the municipality. *Zanesville v. Fannan*, 53 O. S. 605; nor by the fact that the statutes give a remedy to the person injured against the one directly causing the injury. *Ib.*

**In what cases liable.**—*Generally.*—A municipality by allowing a street to become dangerous maintains a nuisance and is liable for personal injury caused thereby. *Cardington v. Admr. of Fredericks*, 46 O. S. 442.

A municipality is not liable in the ordinary case for injury caused by falling on slippery sidewalk where snow and ice had been allowed to accumulate, for it is not the duty of the municipality to remove immediately all snow and ice from sidewalks in all parts of the city. *Chase v. Cleveland*, 44 O. S. 505; *Stamberger v. Cleveland*, 22 C. C. 65; *Van Dyke v. Cincinnati*, 1 Dis-

ney, 532; *Norwalk v. Tuttle*, 73 O. S. 242. And see *Bloom v. Toledo*, 25 C. C. 235; 2 C. C. (N. S.) 108; reversed 72 O. S. 652. But see *Bretsch v. Toledo*, 1 N. P. 210; *Cincinnati v. Grebner*, 25 C. C. 700; 7 C. C. (N. S.) 11. When the slippery condition is apparent it would be negligence to go upon the sidewalk. *Conneaut v. Naef*, 54 O. S. 529; *Schaefer v. Sandusky*, 33 O. S. 246; *Schneider v. Cincinnati*, 16 Dec. 206; 4 N. P. (N. S.) 57; *Norwalk v. Tuttle*, 50 B. 272.

Negligence of municipality in leaving snow and ice on sidewalk, when a question for the jury, see *Russell v. Toledo*, 19 C. C. 418; *Barry v. Akron*, 7 C. C. (N. S.) 575.

City is negligent if it leaves an excavation unguarded on a public way established by user through a market building. *Nitz v. Toledo*, 22 C. C. 454; *Toledo v. Nitz*, 3 C. C. (N. S.) 532; 23 C. C. 350.

City is liable for injury caused by a bridge on a street crossing a stream, being without rails or guards, whereby a child falls in and is drowned. *Boyd v. Cambridge*, 4 C. C. 519.

City is not liable for dangerous condition of land adjacent to street, but not so near as to menace ordinary travelers. *Kelley v. Columbus*, 41 O. S. 263.

City's liability for steam roller loaned by city contractor and left in street, see *Pears v. Cleveland*, 1 Clev. 328.

City is liable for injury due to a part of a sidewalk not conforming to the grade of the street, this condition remaining for a long time to the knowledge of the city. *Toledo v. Higgins*, 12 C. C. 541.

A building permit authorizing temporary obstruction of a street and requiring a light at night, does

not relieve the city of liability. *Cleveland v. King*, 132 U. S. 295.

But city is not liable, without express or implied notice, for injuries caused by failure to guard such temporary obstructions, unless the permit given was to do something intrinsically dangerous. *Columbus v. Penrod*, 73 O. S. 209.

Where city grants permission to make a dangerous excavation in a street, and the excavation is properly guarded, but subsequently the protection is removed, the city would not be liable for injury due to unprotected excavation, in the absence of actual or constructive notice of the removal of the protection. *Hewitt v. Cleveland*, 67 O. S. 534 (without report, reversing 21 C. C. 505).

City is liable for injury resulting from unguarded excavation left by the removal of platform scales in a market place, with knowledge of the city. *Nitz v. Toledo*, 22 C. C. 454.

City is liable for damages resulting from cistern negligently constructed in street. *Circleville v. Neuding*, 41 O. S. 465.

Where a telephone pole in the street has, subsequent to its erection, become dangerous, municipality may be liable for injury caused thereby, after notice of dangerous condition. *Norwalk v. Jacobs*, 27 C. C. 691; 7 C. C. (N. S.) 229.

*Injuries to property.*—City is liable for injury resulting from defective service pipe causing water to leak into plaintiff's cellar, if city has notice. *Cincinnati v. Jacob*, 18 B. 65. For damages caused by preventing surface water from escaping into catch basins, in course of grading a street, and injuring plaintiff's house. *Toledo v. Lewis*, 32 B. 378; for injury caused by overflow of surface water in making side streets.



McBride v. Akron, 12 C. C. 610. Such overflow causing damage is a continuing nuisance for which actions will lie from time to time. Toledo v. Lewis, 17 C. C. 588.

Owner of lot situated lower than street cannot complain of overflow of surface water because of raising of street, if he has received or waived compensation for the change of grade. Sharp v. Cincinnati, 26 C. C. 59; 4 C. C. (N. S.) 19. See also Hamilton v. Ashbrook, 62 O. S. 511.

Where no negligence is shown, city is not liable for settling of a building caused by excavation for a sewer constructed by it. Columbus v. Jaeger, 36 B. 191.

Municipality is liable for injuries resulting from break in water main caused by its negligence. Werner v. Cincinnati, 23 C. C. 475; 3 C. C. (N. S.) 276 (affirmed, 70 O. S. 455).

General principles of municipal liability for damages resulting from improvement of streets, see Cincinnati v. Penny, 21 O. S. 499.

Liability for damages for change of grade, see notes to § 54 of the Code.

Liability for damages resulting from construction of sewer, see notes to § 77 of the Code.

Liability for damages for injury caused by railroad constructed in street, see note "Use Granted to Railroad," *supra*.

**Where duty of county to repair.** — A village having notice thereof is liable for injury caused by a dangerous excavation left in building a bridge within the corporation, although built by the county, and although the village receives no part of the bridge fund. Newark v. McDowell, 16 C. C. 556.

And so, though the county had no

authority to construct the bridge. Newark v. Jones, 16 C. C. 563.

The fact that it was the county's duty to repair a defect in a bridge within the city, does not relieve the city of liability. Mooney v. St. Marys, 15 C. C. 446.

As to liability of city to repair bridge within its limits, but on state or county road where city receives no part of the bridge fund, see Brink v. Columbus, 37 B. 22; Sullivan v. Newark, 7 N. P. 556.

The municipality is liable for injury caused by a hole in a bridge within its limits notwithstanding the duty of the county commissioners to construct and keep in repair such bridge. Mooney v. St. Marys, 15 C. C. 446; Piqua v. Geist, 59 O. S. 163.

But the right of action for destruction of a bridge built by county, but within a village, is in the county commissioners. Perry Co. v. R. R. Co., 43 O. S. 451.

**Where injury is caused through acts of agent of municipality.**—

The wrongful act causing injury may not be done directly by the municipality, but indirectly under its authority. The city is equally liable in such case. Thus a city is liable for the neglect of a city board making a street under a special act. Johns v. Cincinnati, 45 O. S. 278.

It is liable for injury caused in the improvement of a vault by trustees of a cemetery belonging to a city. Toledo v. Cone, 41 O. S. 149.

The city of Cincinnati was held liable for damages for obstruction of access resulting from laying of tracks in the streets by trustees of Cincinnati Southern R. R. English v. Trustees So. Ry., 8 B. 15.

But the city is not liable for the acts of the Board of Education in

allowing a school house to become dangerous. The board of education is not an agent of the city. *Diehm v. Cincinnati*, 25 O. S. 305. Firemen are not the agents of the city so as to make the city liable for their acts. *Thomas v. Findlay*, 6 C. C. 241. Nor will a health officer's act make the city liable. *Turner v. Toledo*, 15 C. C. 627.

Municipality cannot shift the responsibility because the work was done by a property owner for it. *Alliance v. Campbell*, 17 C. C. 595; as where a property owner has constructed the sidewalks which caused injury. *Ib.* Though where the injury has been thus caused by a property owner the city may have an action over against the person directly responsible. *Zanesville v. Fannan*, 53 O. S. 605.

**Independent contractor.**—Where the work in the course of which injury is caused, is done not by an agent of the city, but by an independent contractor, the city is not liable unless the character of the work contracted for is necessarily dangerous or unless the city has retained control over the mode and manner of doing the work. See *Cincinnati v. Stone*, 5 O. S. 38; *Chicago v. Robbins*, 4 Wall. 657.

The city is liable where there was a defect in the plan made by the city engineer and being carried out by the independent contractor. *Dayton v. Pease*, 4 O. S. 80.

The city is liable where its agreement with the independent contractor provides that the work shall be done under the direction of the civil engineer or other person appointed by the city council for that purpose. *Cincinnati v. Stone*, 5 O. S. 38. See *Steubenville v. McGill*, 41 O. S. 235. See also *Bridge Co. v. Steinbrock*, 61 O. S. 215.

The fact that the city gave a permit to use part of a street for placing building materials, etc., would not make it liable to one injured by failure to guard the obstruction, unless the city had notice and was guilty of negligence. *Columbus v. Penrod*, 73 O. S. 209; or unless the permit is to do something necessarily dangerous. *Gable v. Toledo*, 16 C. C. 515; *District of Columbia v. Woodbury*, 136 U. S. 450.

**Notice as a condition precedent to liability.**—The liability of municipality growing out of its duty to keep the streets, etc., in repair and free from nuisance may arise either from actual wrongful acts on the part of the municipality or its agents, such as an improper construction of a street or sidewalk or dangerous excavation, or from its neglect to act, such as its failure to remove obstacles or to make repairs. In the former case the liability of municipality arises without any notice to it. *Middleport v. Taylor*, 2 C. C. 366; *Hewitt v. Cleveland*, 21 C. C. 505; *McGovern v. Mt. Vernon*, 22 B. 363. In the latter case the liability arises only after notice actual or constructive to the municipality of the dangerous obstruction or condition and its failure thereafter to remove it. *Alliance v. Campbell*, 17 C. C. 595; *Groveport v. Bradfield*, 2 C. C. 145; *Chase v. Cleveland*, 44 O. S. 505.

As to notice where defect is caused though work is done in accordance with plan adopted, see *Circleville v. Sohn*, 59 O. S. 285. See further as to latent defect in street, *McGovern v. Mt. Vernon*, 22 B. 363.

Actual notice means notice to the officers having authority over the removal of such nuisances. *McGovern v. Mt. Vernon*, 22 B. 363; *Cleveland v. Payne*, 72 O. S. 347.

So where platform scales in a market place were removed, leaving a dangerous excavation, the fact that the city auditor knew of the excavation, notified new lessee of market space and that superintendent of market was present at the time of removal would show notice to municipality. *Nitz v. Toledo*, 22 C. C. 454; *Toledo v. Nitz*, 3 C. C. (N. S.) 532; 23 C. C. 350.

Notice to policeman would not be actual notice to the municipality, unless municipality was authorized to and did prescribe duties of policemen such as to make them its agents "in respect to its duty to keep the streets open and in repair." *Cleveland v. Payne*, 72 O. S. 347.

Constructive notice is shown by evidence of facts from which it would arise. *Toledo v. Radbone*, 3 C. C. (N. S.) 382; 23 C. C. 268 (affirmed, 68 O. S. 687). As to what facts show constructive notice, see generally *Shelby v. Claggett*, 46 O. S. 549 (knowledge of general defect in sidewalk not notice of particular defect).

As to when constructive notice is shown because the defect or obstruction remains for such a length of time that the municipal authorities in the exercise of ordinary care ought to have known of it, see *Cincinnati v. Frazer*, 18 C. C. 50; *Groveport v. Bradfield*, 2 C. C. 145 (affirmed, 30 B. 351); *Fremont v. Dunlap*, 69 O. S. 286. As to actual notice shown by the character of the defect, see *Toledo v. Higgins*, 12 C. C. 646.

The determination of question of sufficiency of lapse of time to operate as notice of a defect in street, will depend upon location thereof and the circumstances of each particular case. *Kittredge v. Cincinnati*, 28 C. C. 100; 6 C. C. (N. S.) 646.

To charge a municipality with negligence in failing to repair a defect in street, it must be shown that the actual or constructive notice thereof was received in time to make the repair or provide against accident. *Kittredge v. Cincinnati*, 28 C. C. 100; 6 C. C. (N. S.) 646; so

municipality was held not liable for accident due to slippery sidewalk, where sidewalk became slippery over night and accident happened in early morning. *Leipsie v. Gerde-man*, 68 O. S. 1.

And where dangerous condition of street crossing was caused by a hard rain and injury occurred same day, municipality was not charged with notice. *Schneider v. Cincinnati*, 16 Dec. 206; 4 N. P. (N. S.) 57.

**Contributory negligence.** — Where plaintiff's want of ordinary care contributed to the accident, the resulting injury must be borne by him, even though the city was guilty of negligence in allowing the danger to exist. *Clemens v. Dayton*, Ohio Dec. Dayt. 76; *Ohliger v. Toledo*, 20 C. C. 142.

Where a pedestrian leaves the sidewalk and resorts to the street, without necessity, and for his own pleasure or convenience, and meets with an accident, he is guilty of contributory negligence which would bar his recovery. *Groveport v. Bradfield*, 2 C. C. 145.

As to contributory negligence in going upon slippery or defective sidewalk or gutter, where the dangerous condition is apparent, see *Schaeffer v. Sandusky*, 33 O. S. 246; *Conneaut v. Neaf*, 54 O. S. 529; *Peat v. Norwalk*, 26 C. C. 161; 5 C. C. (N. S.) 614; *Cleveland v. Stofer*, 1 O. S. C. D. 300; *Toledo v. Center*, 1 O. S. C. D. 359; *Norwalk v. Tuttle*, 50 B. 272; *Puccine v. Cincinnati*, 15 Dec. 608; 3 N. P. (N. S.) 362; *Toledo v. Fuller*, 27 C. C. 729; 7 C. C. (N. S.) 598; *Akron v. Keister*, 27 C. C. 809; 6 C. C. (N. S.) 603; *Lalond v. Toledo*, 6 C. C. (N. S.) 241.

As to contributory negligence in running into snow piled up in street, see *Donald v. Toledo*, 8 O. F. D. 261.

A charge that if plaintiff's own negligence contributed "in any degree" to the injury he cannot recover, is erroneous. *Nitz v. Toledo*, 22 C. C. 454; see also *Toledo v. Nitz*, 3 C. C. (N. S.) 532; 23 C. C. 350; *Matthews v. Toledo*, 21 C. C. 69 (aff'd without report, 65 O. S. 561);



Schweinfurth v. R. R. Co., 60 O. S. 215; Johnson v. Cincinnati, 20 C. C. 657; Werner v. Cincinnati, 23 C. C. 475; 3 C. C. (N. S.) 276, (aff'd, 70 O. S. 455).

A mistake in treatment, due to error as to nature or extent of injuries will not bar recovery or mitigate damages. Toledo v. Radbone, 3 C. C. (N. S. 382; 23 C. C. 263, (aff'd, 68 O. S. 687).

**Indemnity from property owner causing injury.**—As to the right of the municipality when compelled to pay damages for negligent construction or nuisance in the street, to recover indemnity from the lot owner who directly caused the injury, see Wilhelm v. Defiance, 58 O. S. 56. When the injury is caused by a defect in construction, as in case of a sidewalk negligently laid, the city is liable and cannot recover indemnity, although the lot owner constructed the sidewalk pursuant to a notice from the city. Wilhelm v. Defiance, 58 O. S. 56; but where the injury is caused by defect or obstruction, placed there after construction, the lot owner who caused the same is liable. Morris v. Woodburn, 57 O. S. 330; and the city, if compelled to pay the damages therefor, may recover indemnity. Wilhelm v. Defiance, 58 O. S. 56, 63; Chicago v. Robbins, 4 Wall. (U. S.) 657.

See further as to liability of abutting owner for defect in sidewalk, Grunkemeyer v. Johnston, 47 B. 413.

### **Pleading, practice and evidence.**

—A mere allegation that it was the duty of the municipality to keep the sidewalk in repair and that it negligently omitted to do so without alleging notice of defect before the injury, or that defect was occasioned by positive misfeasance of municipality or its agents, or constructive notice, is not sufficient to sustain action. Middleport v. Taylor, 2 C. C. 366.

In an action for injury from falling into a street excavation, an engineer's prior report as to what excavation is necessary and the

specifications given to the contractor, are not admissible to show the depth of the excavation. Moon v. Middletown, 14 C. C. 498.

A charge that "a city owes no duty to a negligent person" does not correctly state the law and is misleading. A city owes the duty of exercising ordinary care in its control over the streets, although if a person directly contributes to his injury he is not entitled to recover. Ohliger v. Toledo, 20 C. C. 142.

Evidence must show that plaintiff exercised that degree of care that an ordinarily careful and prudent person under the same circumstances would have exercised. Circleville v. Sohn, 20 C. C. 368.

An instruction which makes the degree of care to be used dependent on the apprehension of danger entertained by the plaintiff is misleading. *Ib.*

Evidence that rules required police to report dangerous condition of sidewalks is inadmissible in showing notice to city. Cleveland v. Payne, 72 O. S. 347.

Where icy condition of the sidewalk which caused the accident was produced by ice which had gathered over night, the accident occurring early in the morning, it was held error to submit to the jury whether the village might by the exercise of reasonable care and diligence, have had knowledge of the defect in time to have remedied it, no knowledge being shown. Leipsic v. Gerdeman, 68 O. S. 1.

It is error to charge the jury that it must bear in mind "the extent of territory covered by the city and the number of crossings demanding care, and the number and nature of the duties devolving upon the city and also claiming its care and attention." Cincinnati v. Frazier, 19 C. C. 604.

This section may properly be read to a jury as part of the court's charge in defining the municipality's duty. Toledo v. Nitz, 3 C. C. (N. S.) 532; 23 C. C. 350.

When allegation of portion of street where accident occurred was slightly different from that shown by proof, there is not a fatal va-

riance. *Toledo v. Willinger*, 27 C. C. 512; 6 C. C. (N. S.) 641.

The burden of proof is not on plaintiff to prove the exercise of due care, even when petition alleges that plaintiff exercised due care, unless averments of petition suggest the implication of contributory negligence. *Armleder v. Cincinnati*, 16 Dec. 180.

As to instructions upon value of hypothetical question, see *McLean v. Cincinnati*, 16 Dec. 459; 3 N. P. (N. S.) 676.

Where special findings of a jury, in damage suit against the city for personal injuries, are inconsistent with general verdict, the former will control. *Middleport v. Taylor*, 2 C. C. 366.

When special finding of jury was that the street or bridge was in reasonably safe condition for public travel in the ordinary mode, the city is entitled to judgment, notwithstanding a general verdict against the city. *Troy v. Brady*, 67 O. S. 65.

In an action for injuries caused by a defective sidewalk it is better practice to set out in the petition the dangerous character of the sidewalk. *Middleport v. Taylor*, 2 C. C. 366.

The city is the proper party defendant in an action for damages for failure to keep the streets in repair. *Herrick v. Cleveland*, 7 C. C. 470. As to whether council might be sued, see *Ib.* 479.

The city and parties responsible for unguarded excavation in street cannot be joined as codefendants. *Zeigler v. Ashley*, 1 N. P. 62.

An action against a city for personal injury caused by the city's leaving the streets in a dangerous condition, obstructed by rubbish, etc., is an action for maintaining a nuisance within § 5144 and abates at the death of the party injured. *Cardington v. Adm'r of Fredericks*, 46 O. S. 442.

County commissioners are not proper parties to institute proceedings in mandamus to compel a city to assume care and control over viaduct which commissioners have built within the city limits, under statutory directions. *State ex rel. v. Cincinnati*, 4 N. P. 313.

Where city fails to take charge of and keep in repair a viaduct built within its limits, by a county, the county commissioners are not proper parties to compel the city to accept it by proceedings in mandamus. *State ex rel. v. Cincinnati*, 4 N. P. 313.

As to *quo warranto* proceedings in case where municipality has granted franchise to street railway company to use a bridge within municipal limits, but built by county, see *State ex rel. v. Railway Co.*, 19 C. C. 79.

*Measure of damages.*—As to measure of damages in action for injury to property, see *Cincinnati v. Wright*, 2 N. P. (N. S.) 53.

As to measure of damages in personal injury cases, see *Ohliger v. Traction Co.*, 23 C. C. 265; *Toledo v. Radbone*, 23 C. C. 268; 3 C. C. (N. S.) 382 (aff'd 68 O. S. 687); *Toledo v. Nitz*, 23 C. C. 350; *Toledo v. Fuller*, 27 C. C. 729; 7 C. C. (N. S.) 598.

**Sec. 2642 R. S. [Provision to be made by ordinance for opening streets, etc.]** When it is deemed necessary by the council

of any municipal corporation to open, extend, straighten, alter, divert, narrow, or widen any street, alley, or public highway within the limits of such corporation, the council shall provide by ordinance for the same<sup>1</sup> and such ordinance shall briefly, and in general terms, describe the part, if any, of said street, alley, or public highway to be abandoned by reason of such change thereof, and the property, if any, to be appropriated for such purposes, and the preceeding for such appropriation shall be as provided in chapter three, division seven, of this title.<sup>2</sup> [1906, April 14, 98 v. 143; 70 v. 126.]

(1) See note 2 "Appropriations for street improvement" under § 12 of the Code.

(2) Every section of chapter 3, div. 7, of title XII, referred to here,

is repealed by the Code, and §§ 10 to 22 of the Code substituted. The proceedings, therefore, would be such as are provided in these sections of the new Code.

**Sec. 2643 R. S. [When turnpike or plank-road becomes street.]** When any turnpike or plank-road terminates within the corporate limits, any portion of it so included therein shall become a public street of the corporation and shall be maintained and kept in repair as other streets; and the council may cause the same to be condemned and appropriated<sup>1</sup> for use as such, according to the provisions of chapter three, division seven, of this title.<sup>2</sup> [66 v. 236, § 510.]

**(1) Amount condemned.** — A city cannot condemn a portion of that part of a turnpike brought within its limits, but must condemn all within the corporation. *Turnpike Co. v. Cincinnati*, 2 B. 126.

**Rights of turnpike company.** —Part of turnpike coming within municipal limits becomes a public street and turnpike company is divested of all control over it, notwithstanding compensation has not first been made to the company. *C. C. & W. Tp. Co. v. Traction Co.*, 15 Dec. 118. But see *Turnpike Co. v. Cincinnati*, 5 Dec. (Re) 299.

And turnpike company cannot enjoin trespass by street railway company on such part of its road. *C. C. & W. Tp. Co. v. Traction Co.*, 15 Dec. 118.

**Evidence of value.**—Evidence of the net revenue derived from tolls taken on that portion of a turnpike lying within a municipality, is ad-

missible. *Cincinnati v. Scarborough*, 5 B. 77.

A person familiar with the road, its income and probable future, and an expert in stocks, bonds and investments, may give his opinion as to the rate at which the income of such road should be capitalized. *Ib.*

Conversations of president of turnpike company in negotiating for sale of road to a street railway company to be dedicated to city, are not admissible, as evidence of value on behalf of city seeking to condemn a part of the road within its limits, although city officers were present at the time of the conversations. *Cincinnati and Wooster Turnpike Co. v. Cincinnati*, 19 C. C. 607.

The jury may ascertain the probable future income of the whole road by considering the past income, probable future travel, the chances of evading toll because of future cross streets, contracts with a street railroad for use of the road, con-



tracts for repair and other expenses, and the proportion of the income that may be lost by the appropriation. *Avondale v. Tp. Co.*, 18 B. 308.

In capitalizing the income lost by the appropriation the jury may consider the legislative right to reduce tolls, and the chances of forfeiture for non repair, etc. The capitalization must be such as would reasonably be earned by a safe investment. *Ib.*

There are two methods of fixing compensation for part of turnpike appropriated by a municipality which may be resorted to: First,—

the direct method of determining in detail the present cash value tangible and intangible, of the property according to its best use and adaptability; second — the capitalization method, of determining the rate of per cent, at which the probable future net annual income of the strip appropriated should be capitalized, and then ascertaining therefrom the capital as the basis of value of all the property taken. *C. C. & W. Tp. Co. v. Cincinnati*, 6 N. P. 233.

See *Cincinnati v. Delhi*, etc. *Tp. Co.*, 33 B. 250.

(2) See note 2 to § 2642 R. S., *supra*.

**Sec. 2644 R. S.** [Cost of improving turnpikes, etc.] When any portion of a turnpike or plank-road, or the control thereof, is required by a municipal corporation, or when any arrangement is made with the company owning the same for the improvement or repair thereof, provision for the cost, and for improving and keeping such turnpike or road in repair, shall be made, as is provided with respect to the streets and other highways of the corporation.<sup>1</sup> [66 v. 250, § 597.]

(1) **Assessment of cost of condemnation** of toll road was held to be properly levied on abutting property in *Winslow v. Cincinnati*, 10 C. C. 191, 53 O. S. 665; but see *Ry. Co. v. Cincinnati*, 62 O. S. 465, and *Dayton v. Bauman*, 66 O. S. 379.

**Contract exempting from toll** the residents of a village in consid-

eration of annual payment by village to turnpike company, held to amount to a method of collecting toll. *State v. Lower River Road*, 21 C. C. 662. As to the validity of such a contract see *Extension of Lower River Road Co. v. Cincinnati*, 13 Dec. 214. (See 2 O. L. R. 281.)

**Sec. 2645 R. S.** [Remedy for neglect of corporation to keep turnpike, etc., in repair.] If a municipal corporation condemn any portion of a turnpike or plank-road, and fail to keep the portion so condemned in as good condition and repair as is required by the charter of the company, the directors of the company may, by writ of mandamus, compel the corporation to perform that duty. [72 v. 164, § 598.]

**Sec. 2646 R. S.** [How turnpike or plank-road condemned for street purposes.] If any city has extended or hereafter extends its limits so as to include therein a portion of any turnpike or

plank-road, without purchasing or condemning the same, the council shall, within six months after the mayor is notified in writing that such company demands compensation therefor, proceed in the manner prescribed in chapter *three*, division *seven*, of this title,<sup>1</sup> to cause such portion of such turnpike or plank-road to be condemned for street purposes; on failure of such council so to proceed, the president of such turnpike or plank-road company,<sup>2</sup> if authorized by the directors thereof, may file an application in the Court of Common Pleas of the proper county, setting forth the facts aforesaid, and asking that the value of such portion of the turnpike or plank-road may be assessed by a jury,<sup>3</sup> the cause shall be conducted to final judgment in the manner provided in said last mentioned chapter, so far as the same is applicable, and such city shall pay the compensation awarded by the jury, with interest, and cost, in such proceeding, within one year after date of the rendition of the verdict, and when the compensation awarded has been paid, the title to such portion of such turnpike or plank-road shall vest in the city, and for the purpose of providing means to pay for the same, the city council of any city of the first or second grade of the second class,<sup>4</sup> may levy a tax in addition to the amount now limited by law. [72 v. 164, § 598.]

(1) See note 2 to § 2642 R. S., and see as to condemnation of turnpike in municipal limits, § 3491 R. S. in Part II.

(2) A corporation organized to provide for the keeping in repair of gravel, macadamized roads, etc., although the road of such corporation be a plankroad, was held to be a turnpike company within the meaning of this section and its remedy for compensation of part of its road

taken by a city to be as provided here, and such company was held not entitled to a civil action as a plankroad company under act of March 23rd, 1869, 66 O. L. 36. *Tremainsville Pl. & Tp. Co. v. Toledo*, 31 O. S. 588.

(3) See note 2 to § 2642 R. S. *supra*.

(4) See note 6 "Grades and classes under new Code" under § 1599 R. S., p. 31.

**Sec. 2647 R. S. [Adaptation of turnpike or plank-road to corporation uses, etc.]** When the road of any turnpike or plank-road company passes through or terminates in any municipal corporation, the council or trustees shall have power, with the consent of the company, to make any improvement or repair of such road, additional to the improvement or repair required by law of the company, that, in the opinion of the council or trustees, will better adapt such road to use as a street of the corporation. [66 v. 251, § 599.]

**Sec. 2648 R. S. [Right of toll not to be impaired.]** The right of any company to take toll at any toll-gate established in the corporation, shall not be impaired by anything in this title contained, except where the road of the company has been duly appropriated, and compensation made therefor, or the rights of the company in the road have been surrendered by agreement.<sup>1</sup> [66 v. 251, § 600; 66 v. 36.]

(1) **Toll gate in municipal limits.**—A contract between municipality and turnpike company, by which the company is allowed to maintain part of its road in the municipal limits and collect toll for such part, must be construed with reference to the laws providing for location of toll gates, and the company may collect toll for the part of the road in city limits if its toll gate is properly located. *Springfield Tp. Co. v. Springfield*, 27 O. S. 584.

This section was held not to re-

peal or modify § 34 of Act of May 1, 1852, making it unlawful to keep up a toll gate or collect tolls within municipal limits. *Tp. Co. v. Kelley*, 41 O. S. 144. But under provisions of § 3491 R. S. it was held a company cannot collect tolls for the part of its road included in a municipality. *Madisonville v. Tp. Co.*, 17 B. 30. See further, *Bader v. Lower River Road*, 21 C. C. 662.

As to condemnation of turnpike and removal of toll gate in municipal limits, see § 3491 R. S.

**Sec. 2649 R. S. [Use of national road by city or village as street; agreement with county commissioners to keep same in repair.]** The council of any city or village through which the national road passes may, after filing with the county commissioners an agreement, in writing, authorized by the council, and signed by the president thereof, binding itself to keep such road in such repair as is contemplated by the act or acts of congress ceding to the state of Ohio the jurisdiction and control of such portion of said road as lies within this state, take under their care and control so much of the road as passes through the corporate limits of such city or village, and use and occupy the same as a street or streets for such city or village; and when such road is so taken, the same shall be kept in the repair aforesaid, at the proper cost and expense of the city or village.<sup>1</sup> [70 v. 194.]

(1) **Keeping in repair.**—For discussion of relation between State and municipality in keeping na-

tional road in repair, see *Hollingworth v. State*, 29 O. S. 552.

**Sec. (2649—1) R. S. § 1. [Control of city councils over portions of national road.]** The city council of any municipal



corporation in this state, through which the national road passes, shall have power to improve, repair, widen, and grade the road-bed, gutters, and sidewalks of said road within the corporate limits of such city, in the same manner and upon the same terms and conditions that such city council are now authorized to make such improvements, repairs, and grades, by virtue of "an act to provide for the organization and government of municipal corporations," passed May 7th, 1869, and all acts amendatory thereof. [70 v. 153.]

**Sec. (2649—2) R. S. § 1. [Transfer of national road to certain cities and villages; conditions.]** The council of any city or incorporated village within this state, through which the national road passes may, and they are hereby authorized to take under their care and control so much of the said road as passes through the corporate limits of such city or village, and use and occupy the same as a street or streets for such city or village. That where said road shall be so taken by such city or village, the same shall be kept in such repair at the proper costs and expenses of the city or village so taking possession thereof, as is contemplated by the act or acts of congress ceding to the state of Ohio the jurisdiction and control of such portion of said road as lies within this state; provided, that if at any time, in the opinion of the board of public works, any portion of said road so taken possession of by any city or village, is not kept in such repair, said board may, in its discretion, resume the control and management of said portion, and from that date the power given in this act to such city or village shall cease. [70 v. 194.]

**Sec. (2649—3) R. S. § 2. [Agreement to keep in repair to be filed with board of public works.]** Before exercising any such control over any such portion of said road as lies within its corporate limits, such city or village shall file with said board of public works an agreement in writing, binding itself to keep such road in such repair; which agreement shall be authorized by the council thereof, and signed by the president of such council.<sup>1</sup> [70 v. 194.]

(1) **Agreement with state by municipality to keep national road in repair in consideration of the abandonment of toll collections**

within the corporate limits was held valid in *Hollingsworth v. State*, 29 O. S. 552.

*(b) Dedication of Streets.*

**Sec. 2650 R. S. [Dedication of streets; acceptance by council necessary.]** No street or alley which has been or may be dedi-

ated to public use by the proprietor of ground in any corporation, shall be deemed a public street or alley, or under the care or control of the council, unless the dedication is accepted and confirmed by an ordinance specially passed for such purpose.<sup>1</sup> [66 v. 222, § 440.]

**(1) Character of provision.**—This section is not intended as a limitation upon the general powers of a municipality for opening and improving streets, but as a restriction to prevent the municipality from being vested with the title to and charged with the care of streets and alleys without its consent. *Wisby v. Bonte*, 19 O. S. 238.

*Public highways already established*, coming into a municipal corporation by annexation, do not have to be accepted and confirmed by ordinance before they come under the control of council. This section was not intended to withdraw from control of council such streets as are already established by public use and by the acts of the city authorities improving them. *Steubenville v. King*, 23 O. S. 610; *R. R. v. Defiance*, 10 C. C. 27, 32 (affirmed, 52 O. S. 262).

*Does not abolish common law dedication.*—Notwithstanding the provisions of § 2650, there may be an offer of dedication and an acceptance by public use under the principles of common law; although, under § 2650 no liability attaches to the municipality to keep such highway in repair till after ordinance passed. *Winslow v. Cincinnati*, 6 N. P. 47, 53; affirmed, 53 O. S. 665.

*Applies only to streets or alleys.*—This section does not apply to a dedication of a park to a municipality. *Abraham v. Cincinnati*, 13 Dec. 619.

**Kinds of dedication.**—Valid dedication of property for street

purposes may be made either (a) according to the rules of common law, or (b) under the statute. See *Fulton v. Mehrenfeld*, 8 O. S. 440; *Sullivan v. Columbus*, 12 Dec. 650.

**Common law dedication.**—In case of a *common law dedication*, there must be not only a dedication to public uses by the owner, but also an acceptance by the public. Such a dedication operates by way of estoppel and not as a grant or transfer of interest. *Fulton v. Mehrenfeld*, 8 O. S. 440; *Sullivan v. Columbus*, 12 Dec. 650; *Abraham v. Cincinnati*, 13 Dec. 619.

The dedication and acceptance may be shown by acts and declarations of the parties and surrounding circumstances. *Ib.*

But the intention to make a dedication must be shown by acts clearly evincing such intent. *Webber v. Toledo*, 3 C. C. (N. S.) 319; 23 C. C. 237.

A defective statutory dedication in evidence, as an act *in pais*, of a dedication at common law by the owner. *Daiber v. Scott*, 3 C. C. 313.

**Intention to dedicate.**—As to what will constitute an intention to dedicate sufficient to show a common law dedication, see *Penquite v. Lawrence*, 11 O. S. 274 (acquiescence in public use); *Wisby v. Bonte*, 19 O. S. 238; *Daiber v. Scott*, 3 C. C. 313 (accepting lots of subdivision platted with streets); *Lockland v. Smiley*, 26 O. S. 94, 100. (description in a deed of property as bounding on a street), *Schlemmer v. Furniture Co.*, 7 C. C. (N. S. 468; 15 Dec. 92; 2 N. P. (N. S.) 293 (describing property as an "alley" and its use by public as such); *Ry. Co. v. Cleveland*, 1 N. P. 1; (allotment in partition reserving rights of way not a dedication, though rights of way are open to public use); *Boer-*



es v. Strader, 1 C. S. C. R. 57, (merely having property open to public as a wharf, not a dedication); Macneale v. Cincinnati, 8 B. 324, (purchase of lot described as abutting on street and strip called street used by public for long period); Duffy v. Norwood, 3 N. P. 325, (call for a street in deed, and public use of the street); Cherry v. Howe, 17 C. C. 246, (leaving strip off end of lot open to afford access to owners' tenants, not a dedication); Millikin v. Bowling Green, 9 C. C. 493, (owner putting down board walk on his own property, but bordering a street whose lines are unmarked not a dedication); Winslow v. Cincinnati, 6 N. P. 47, (attaching to donor's will a plat with street marked on it); Toledo v. Ry. Co., 17 C. C. 265, 279; Myers v. Toledo, 18 C. C. 817, (co-owners partitioning by making a plat showing streets); Toledo v. Converse, 21 C. C. 239, (making a plat showing a triangular piece of ground colored as streets are colored on the map, and having no lot number, but not within dimensions of streets mapped and no taxes being paid on the strip, do not show intention to dedicate); Deutsch v. Chemical Co., 8 N. P. 428, (having a private right of way open to the public for several years, but having a sign "Private Property," etc., not a dedication); Eagle, etc., Co. v. Cincinnati, 1 C. S. C. R. 154, (reserving, in a lease, part of property abutting on alley "for private street" but the strip being used by the public for 30 years.); Cincinnati v. McMakin, 38 B. 261 (a covenant in a deed to dedicate a certain strip on demand not enforceable by the city); Weber v. Toledo, 23 C. C. 237 (fact that owner of property, a part of which is appropriated to widen a

street, puts down sidewalks, either voluntarily or by order of city, not to be construed as intention to dedicate); Wright v. Oberlin, 23 C. C. 509 (a map, though not acknowledged or recorded, may bind parties to a dedication, and a dedication may be made by allowing public to use the property).

Where boundary line of street dedicated is in dispute, what evidence will establish true line, see *Mooren v. Cleveland*, 15 Dec. 456.

*Acceptance.*—Acceptance is necessary to constitute dedication. *Lunkenheimer v. Cincinnati*, 23 C. C. 617.

As to what will constitute an acceptance, so as to complete a dedication according to the rules of common law, see *Doren v. Horton*, 1 Disney 401, (acts of possession and use by public); *Dick v. Toledo*, 11 C. C. 349, 350, (a city ordinance accepting); *Winslow v. Cincinnati*, 6 N. P. 47 (acceptance not measurable by any standard and any use naturally following from the nature of the place, is sufficient); *Millikin v. Bowling Green*, 9 C. C. 493, (uses by public outside established lines of street); *Toledo v. Converse*, 21 C. C. 239, (persons driving outside lines of street and over property claimed to be dedicated not an acceptance); *Ry. Co. v. Carthage*, 36 O. S. 631, (ordinance providing for use of street by railway); *Lough v. Machlin*, 40 O. S. 332, (alley on recorded plat afterwards vacated by ordinance, not acceptance).

*Estoppel.*—No estoppel on municipality to claim dedication because of assessment and taxation of land claimed. *Reynolds v. Newton*, 14 C. C. 433; but see, *contra*, *Toledo v. Converse*, 21 C. C. 239, and *Lunkenheimer v. Cincinnati*, 3 C. C. (N. S.) 143; 23 C. C. 617. Deed of dedication estops persons under it from denying existence of highway, although highway is not such in sense

that public must repair. *Hayes v. Park Co.*, 13 Dec. 67. See further *Abraham v. Cincinnati*, 13 Dec. 619.

**Statutory dedication.**—In the case of a *statutory dedication*, there must be some form of grant or transfer to the municipality, and all the statutory requirements must have been complied with. *Sullivan v. Columbus*, 12 Dec. 650; *Abraham v. Cincinnati*, 13 Dec. 619.

A statutory dedication may be made either:

(a) By the platting commission making a plat (see § 142 of the Code), and the owner accepting the plat, as provided in § 2634 R. S., or

(b) By the owner making a plat as provided in § 2601 R. S.

As to what is necessary to constitute a statutory dedication, see *Stephenson v. Leesburg*, 33 O. S. 475, (imperfect plat); *Satchell v. Doran*, 4 O. S. 542, (plat not duly executed not *per se* evidence of alley); *Lockland v. Smiley*, 26 O. S. 94, (imperfect plat not duly acknowledged not a statutory dedication); *Doren v. Horton*, 1 Disney 401, (recorded plat without acknowledgment does not dedicate); *Ashley v. Toledo*, 13 C. C. 1, (subdivision acknowledged only by owners of one-sixteenth of tract); *Reynolds v. Newton*, 14 C. C. 433 (plat not signed by all owners, but all parties to a subsequent partition); *Sullivan v. Columbus*, 12 Dec. 650,

(immediate improvement not necessary).

**Grantee in esse** not necessary to a dedication. *William v. Society*, 1 O. S. 478; *Brown v. Manning*, 6 O. 298.

**Condition in a dedication** does not invalidate it, but the condition becomes inoperative. *Richards v. Cincinnati*, 31 O. S. 506. And see *Lloyd v. Hulbert*, 1 C. S. C. R. 228.

**Dower** cannot be claimed in lands dedicated to public use. *Gwynne v. Cincinnati*, 3 O. 24.

**What dedication includes.**—Dedication of land for street purposes carries with it the right to remove lateral support of the residue in the improvement of the street. *Ross v. Cincinnati*, 24 C. C. 43 (aff'd 67 O. S. 521); but see *Cincinnati v. Skinner et al.*, 12 Dec. 735; and see also *Grant v. Hyde Park*, 47 B. 831, and *Tenney v. Cincinnati*, 24 C. C. 237 (aff'd 67 O. S. 518), holding that where property is condemned for street purposes the inquiry embraces not only an ascertainment of compensation to the land owner for the land taken, but damages to the residue of his abutting land which may result from the grading of the street.

**Agreement to dedicate**, made with grantees of lots in neighborhood, whether municipality can take advantage of, see *Abraham v. Cincinnati*, 13 Dec. 619.

**Sec. 2651 R. S.** [Power of villages to procure material to improve streets.] The councils of villages, where material for graveling and macadamizing the streets must be transported by rail, shall have like power with county commissioners in case of turnpike roads. [67 v. 52, § 2.]

### (c) Vacation of Streets by Council.<sup>1</sup>

**Sec. 2652 R. S.** [Vacation of streets, change of name, etc.] The council of any city or village, on petition by any person owning a lot in the corporation praying that a street or alley in the immediate vicinity of such lot may be vacated or narrowed,

or the name thereof changed, may, upon hearing, and upon being satisfied that there is good cause for such change of name, vacation or narrowing, that it will not be detrimental to the general interest, and that the same should be made, declare by ordinance such street or alley vacated,<sup>2</sup> narrowed, or the name thereof changed;<sup>3</sup> provided, however, that where, in any city or village, there shall be two or more streets, avenues or alleys of the same name, the council may, by ordinance and without petition therefor, change the name of any such street, avenue or alley, so as to leave only one street, avenue or alley to be designated by said original name; and provided, also, that when in the opinion of the council there is good cause for vacating or narrowing any street or alley, or any part thereof, and that such vacation or narrowing will not be detrimental to the general interest, council may by ordinance and without petition therefor, vacate or narrow such street or alley or any part thereof; but notice of the intention of council to vacate any street, alley, avenue, or part thereof shall, in all cases, be given as provided in section 2653 of the Revised Statutes, except when there is filed with council written consent to such vacation by the owners of the property abutting the part of the street or alley proposed to be vacated, in which case such notice shall not be required. And council may include in one ordinance the change of name, or the vacation or narrowing, of more than one street, avenue or alley. [1906, April 16, 98 v. 202; 90 v. 350; 67 v. 78, § 491.]

(1) For vacation of streets by court, see § 2655 R. S. *et seq.*

(2) **Statutory method exclusive.**—Streets and highways can be abandoned by municipalities only in the manner provided by statute, and their use cannot be destroyed except for a purpose beneficial to the public. *Ry. Co. v. Elyria*, 14 C. C. 48, 52.

Streets do not become abandoned and revert to original proprietors by nonuser or misuser by the municipality. *Williams v. Presbyterian Society*, 1 O. S. 478.

**Part of county road** brought within limits of a municipality by annexation, cannot be vacated by

council. *Ry. Co. v. Cummins*, 34 B. 301.

**Who may claim damages.**—Owners in immediate vicinity of, but not abutting on, street sought to be vacated, cannot claim damages for vacation, unless specially injured. *In re Ry. Co.*, 19 C. C. 308; *Doppas v. R. R. Co.*, 19 C. C. 582 (aff'd 66 O. S. 648).

**To whom vacated streets revert.**—See notes to § 2654 R. S.

(3) **Change of name.**—Council cannot change the name of a street without good cause, except on petition of abutting owners. *Miller v. Cincinnati*, 21 B. 121 (edit.).

#### FORM OF PETITION TO VACATE STREET, ETC.

To the council of the city [or village] of....., State of Ohio:

The undersigned, owners of lots in the city [or village] of....., in the immediate vicinity of.....street, from.....to



.....respectfully petition your honorable body that.....  
 street may be vacated between the points named, for the reason that it  
 is no longer of use to the public and its vacation will not be detrimental  
 to the general interest.

.....Owner of lot No.....

.....Owner of lot No.....

Etc.

(If it is desired to have an alley vacated, or a street or alley widened or  
 the name changed, the above form may be adapted to suit the circum-  
 stances.)

### **Sec. 2653 R. S. [Notice of application to be published, etc.]**

No street or alley shall be vacated or narrowed as aforesaid,  
 unless notice of the pendency and prayer of the petition be given  
 by publishing the same in some newspaper published or of  
 general circulation in such municipal corporation, for six con-  
 secutive weeks preceding action on such petition, or, where no  
 newspaper is published in the corporation, by posting the notice  
 in three public places therein six weeks preceding such action;  
 and action thereon shall take place within three months after  
 the completion of the notice. [67 v. 78, § 492; (S. & C.  
 1531).]

### **FORM OF NOTICE.**

Notice is hereby given that a petition by owners of lots in the immediate  
 vicinity of.....street has been presented to the council of the  
 city [or village] of....., praying for the vacation of said  
 street, from.....to.....; and that said petition is  
 now pending before said council and final action thereon according to law  
 will be taken on and after.....19.... (not less than six weeks  
 after date of first publication nor more than three months after completion  
 of notice).

.....19.....

Clerk of the city [or village] of.....

### **FORM OF ORDINANCE TO VACATE STREET.**

Ordinance No.....

To vacate.....street, from.....to.....

Whereas, on the.....day of.....19...., a petition  
 by persons owning lots in the immediate vicinity of.....street  
 from.....to.....was duly presented to council pray-  
 ing that said street, between the points named, be vacated; and notice of  
 the pendency and prayer of said petition has been given as required by  
 law, by publication in....., a newspaper of general cir-  
 culation in the corporation, for six consecutive weeks ending.....  
 19....; and,

Whereas, council, upon hearing, is satisfied that there is good cause for such vacation as prayed for, that it will not be detrimental to the general interest, and ought to be made, now therefore,

*Be it ordained by the council of the city [or village] of.....*  
State of Ohio, Sec. 1: That.....street from.....  
to.....be and the same is hereby vacated.

Sec. 2: That this ordinance be and remain in force from and after the earliest period allowed by law.

Passed.....19.....

....., President of Council.

Attest: .....

Clerk.

**Sec. 2654 R. S. [Effect of order of vacation, etc.]** The order of the council vacating or narrowing any street or alley which has been dedicated to public use by the proprietor, shall, to the extent to which the same is vacated or narrowed, operate as a revocation of the acceptance thereof by the council; but the right of way and easement therein of any lot owner shall not be impaired thereby.<sup>1</sup> [66 v. 232, § 493.]

(1) **To whom vacated streets revert.**—To the streets of a city, the municipality holds a qualified or determinable fee. The limitation upon the title necessarily implies that there is a substantial interest not conveyed which will revert when the street is vacated. This interest is a private right in the nature of an incorporeal hereditament legally attached to the contiguous grounds and erections on them (Crawford v. Delaware, 7 O. S. 459, 469; Railway Co. v. Cumminsville, 14 O. S. 523; Ry. Co. v. Lawrence, 38 O. S. 41) and in case of vacation the land will go to the owner of the abutting property, and not to the original owner of the land at the time it was dedicated or taken for street purposes. Callen v. Electric Light Co., 66 O. S. 166, 173; Kinnear Mfg. Co. v. Beatty, 65 O. S. 264; Stevens v. Shannon, 6 C. C. 142; Hamilton G. & C. Traction Co. v. Parish, 67 O. S. 181, 190; but see Lough v. Maehlin, 40 O. S. 332 (where the street dedicated had never been accepted, and the abutting owner's deed did not give title to the middle of the street).

Conveyance of the abutting property, even after vacation, conveys the grantor's interest in the street, if this is not specially reserved in the deed. Kerr v. Commissioners, 42 B. 193 (Supreme Court, not reported).

The reverter is subject to such rights as other property owners have in the property as a necessary

means of access to their property. Kinnear Mfg. Co. v. Beatty, 65 O. S. 264; Stevens v. Shannon, 6 C. C. 142. And property owner may enjoin obstruction to his only means of access. *Ib.*

But a property owner whose land abuts on street, a part of which, not in front of his property, is vacated, has no right to enjoin the obstruction of the vacated portion by the owners to whom it reverted, where he has reasonable access to his property. He must suffer a special inconvenience different in kind from that of the general public, before he is entitled to relief. Kinnear Co. v. Beatty, 65 O. S. 264.

But an alley vacated by council cannot be obstructed by petitioning owner at its only exit, as against a non-petitioning abutting owner, without furnishing another reasonable means of egress therefrom, notwithstanding non-petitioning owner has access to a street in front of his lot. Schlemmer v. Furniture Co., 2 N. P. (N. S.) 293; 7 C. C. (N. S.) 468.

Merely failing to appear and protest against vacation does not estop non-petitioning owner from enjoining obstruction. *Ib.*

**Effect of section.**—This right which other lot owners have by law is merely preserved by this section, and it does not create any new right. Kinnear Mfg. Co. v. Beatty, 65 O. S. 264. See also Schlemmer v. Furniture Co., 15 Dec. 92; 2 N. P. (N. S.) 293.

(d) *Vacation of Streets by Court.*

**Sec. 2655 R. S.** [Vacation or establishment of street or alley by court.]<sup>1</sup> On petition filed in the Court of Common Pleas by any person owning a lot<sup>2</sup> in any city or in an incorporated or unincorporated hamlet<sup>3</sup> or village, for the establishment or vacation of a street or alley in the immediate vicinity of such lot, the court, upon hearing, and being satisfied that it will conduce to the general interests of such city, hamlet, or village, may declare such street or alley established or vacated; but the remedy shall be in addition to those prescribed in this title.<sup>4</sup> [37 v. 44, § 1; 76 v. 25, § 15; S. & C. 1487.]

(1) **Vacation of streets by council**, see § 2652 R. S. *et seq. supra*.

**When section applies.**—The statutory remedy may be resorted to in all cases where there has been a clear non-user of the street by the public for 21 years. *Nail & Iron Co. v. Furnace Co.*, 46 O. S. 544, 549.

But this section does not apply where the city never had title to the parcels sought to be vacated or had forfeited title. *Miller v. Cincinnati*, 5 C. C. 583.

See *Ry. Co. v. Elyria*, 14 C. C. 48, 52.

No authority to *narrow* a street or alley, under this section. *Dorsch v. Glass Co.*, 74 O. S. — (51 B. 183.)

(2) **Municipality is not a lot owner** within the procedure here provided for. *In re vacation Hotel Alley*, 25 B. 89.

(3) See note "status of hamlets" under § 1 of the Code.

(4) Refers to Title XII. R. S.

## FORM OF PETITION FOR VACATION OF STREET.

Court of Common Pleas, .....County, Ohio,

*In re vacation of* .....street. } Petition.

Petitioner represents that he is the owner of lot No. ....on..... street in the city [or village] of....., State of Ohio, in the immediate vicinity of.....street from..... to.....in said city [or village].

Petitioner further represents that it will conduce to the general interest of said city [or village] to have said.....street from ..... to ..... vacated.

Wherefore, petitioner prays that the court may declare said.....street from.....to.....vacated.

By.....

His attorney.

[Verification.]



(Petition must be filed at least 40 days previous to the term of court in which the hearing is to be had.)

**Sec. 2656 R. S.** [Petition for vacation or establishment, and notice thereof.] Notice of the pendency, object and prayer of a petition for the vacation or establishment of a street or alley as aforesaid shall be given by publication in some newspaper of general circulation in the county in which said street or alley is located, for four consecutive weeks on the same day of the week, and the cause may be heard and determined at any time after the expiration of ten days from the date of last publication; and if any person other than the petitioner, owning a lot in the immediate vicinity of such street or alley prayed to be vacated or established, claims that he will sustain damage thereby the court may proceed to hear proof in reference thereto and may render judgment against the petitioners for such damages as it may think just, and the same shall be assessed by the court against the petitioners ratably according to the value of the property owned by them as the same stands taxed on the tax list of the county; and a jury may be demanded as in other cases; and when necessary the court shall appoint a guardian *ad litem* for all minors or persons of unsound mind who may be interested in the premises.<sup>1</sup> [95 v. 449; 37 v. 44; S. & C. 1488.]

(1) This section is given as amended May 9, 1902. (See § 212 of the Code.)

**Validity of section.**—In so far as this section authorizes the court to assess compensation without a jury, it is unconstitutional. *Cincinnati v. Hamilton Co.*, 1 Disney, 4.

**Who may recover damages.**—Owners of lots in the immediate vicinity of, but not abutting on the street vacated, cannot recover damages for such vacation, unless they have suffered some special damage, different from that of the general public. *In re C. N. O. & T. P. Ry.*, 19 C. C. 308; *Doppas v. R. R. Co.*, 19 C. C. 582 (aff'd 66 O. S. 648); *Kinnear Mfg. Co. v. Beatty*, 65 O. S. 264.

Proof of frequent use of vacated

street by such owners, and that they would be greatly inconvenienced does not show such special injury, if other egress is possible. *Ib.*

The intended use of the street by the person to whom it will revert as evidence of lot owner's injury cannot be shown in action under this section. *Ib.*

**Where municipality damaged.**—A municipality has such a proprietary interest in its streets, as to be entitled to compensation under this section if it suffers special damage by reason of change of drainage, etc. *Cincinnati v. Hamilton*, 1 Disney, 4.

But a municipality is not a "lot owner" within the procedure provided in this section and cannot be heard on question of its general damages, such as an ordinary lot

owner would suffer; but it is entitled to be compensated for special damage, such as that caused by change of drainage. *In re vacation of Hotel Alley*, 25 B. 89

### FORM OF NOTICE OF PETITION.

Notice is hereby given that.....the owner of a lot in the immediate vicinity of.....street from.....to.....in the city [or village] of.....County, Ohio, has filed a petition in the Court of Common Pleas of said county, alleging that it will be conducive to the general interest of said city [or village] to have said.....street from.....to.....vacated, and praying the court to declare said street between said points vacated.

Said petition will be for hearing on and after.....19...., the first day of the next term of said court.  
.....19.....

.....  
Attorney for petitioner.

#### **Sec. 2657 R. S. [Street not to be closed until damages paid.]**

A street or alley so declared vacated, under the provisions of this subdivision, shall not be closed or obstructed until the damages so assessed shall have been fully paid to the persons entitled to the same.<sup>1</sup> [37 v. 44, § 3; S. & C. 1488.]

(1) **Injunction.**—Property owner has a right to an injunction to prevent the closing of a street on which his property abuts, by vacation or obstruction, if the street is cut off near enough to his property to materially affect its value, unless he is first compensated for his

injury. *Madden v. Ry.*, 21 C. C. 73, (aff'd 66 O. S. 649); but where his property does not abut on the street vacated and he has other reasonable means of access, he is not entitled to injunction. *Kinnear Mfg. Co. v. Beatty*, 65 O. S. 264.

#### (e) *Labor Upon Streets.*<sup>1</sup>

#### **Sec. 2660 R. S. [Road districts and street commissioners.]**

The board of public service shall have power to form road districts within the limits of the corporation, and when contiguous territory is attached to the corporation for road purposes, such power shall extend to the territory so attached; and the board of public service shall employ one street commissioner for each district, and prescribe his duties and fix his compensation. [1906, April 16, 98 v. 328; 87 v. 70; 66 v. 231.]

(1) This subject was formerly contained in Subdivision IV., chap. 13, Div. 8, Title XII. R. S., all the sections of which are retained here.

**Further provisions** relating to repair of streets and roads within municipal limits will be found in Part II., Title XVI., "Streets."

**Sec. 2661 R. S. [Road taxes, how collected and applied.]** No tax assessed upon property within the territory attached to any corporation as aforesaid, shall be applied otherwise than within the territory in which the same is assessed; and all taxes charged for road purposes on the property within the limits of the corporation, or the territory so attached, and collected by the county treasurer, shall be paid over to the corporation treasurer, to be specially appropriated by the council to street and road purposes within the corporate limits and territory so attached; and the trustees of the township in which such territory is located, and the council, may agree upon a different distribution or division of the funds.<sup>1</sup> [66 v. 231, § 487; (S. & S. 840).]

(1) See *Lima v. McBride*, 34 O. S. 338.

**Sec. 2662 R. S. [Attachment of contiguous territory for road purposes.]** It shall be the duty of the council, and the trustees of townships, respectively, in which any such corporation is situated, when the same has not already been done, where from the sparseness of population the public interest requires it, to attach to the corporation any territory lying contiguous thereto, for the purposes mentioned in this subdivision; and any portion of territory so attached may be detached, and replaced under the control of the township trustees for road purposes, by the council, with the concurrence of the township trustees. [67 v. 78, § 488; (S. & S. 840; S. & C. 1556).]

**Sec. 2664 R. S. [Exemption from provisions of this subdivision.]** Persons who are or may be exempt from performing labor on the public highway, shall not be subject to the provisions of this subdivision.<sup>1</sup> [66 v. 231, § 490; (S. & S. 840).]

(1) See note (1) to § 2660 *supra*.

**Sec. (2664—1) R. S. § 1. [Labor upon streets, etc., of municipality; who liable; exemptions.]** The council of any municipal corporation may require each able-bodied male person between the ages of twenty-one and fifty-five years, resident of the corporation, or territory attached as in this subdivision<sup>1</sup> provided, to perform by himself or substitute, in each year, two days' labor upon the streets and alleys of such corporation, or upon the public roads or highways that lie with [in] such at-



tached territory, which labor shall be in lieu of the two days' labor required to be performed upon roads and highways; provided, that active members of volunteer engine companies not exceeding sixty-four, of hook and ladder companies not exceeding thirty, and of hose companies not exceeding twenty, shall be exempt from the performance of such labor during such membership, and, having served faithfully as such for five consecutive years, shall be exempt for five years thereafter; and provided further, that such labor may be commuted by the payment of three dollars (\$3.00) to be expended where the labor should have been applied. [92 v. 162.]

(1) See note (1) to § 2660 *supra*.

**Sec. (2664—2) R. S. § 2. [Fines, etc., to which delinquent liable.]** Upon the refusal to perform such work under the proper street commissioner, or other officer appointed by the council, the delinquent shall be liable to the same fines, penalties, and forfeitures as are provided against persons refusing to perform two days' labor upon the roads and highways in other cases; and the same shall be recovered in the name of the corporation, before the mayor thereof. [92 v. 162.]

**Sec. (2664—3) R. S. § 3. [Collection of fines, etc.]** The street commissioners, or other proper officers, shall have power to collect by suit, all fines, forfeitures and penalties arising under the provisions of this subdivision, and they are hereby authorized and required, before their annual settlement with the council, to prosecute to final judgment all persons neglecting or refusing to comply with the provisions of this subdivision, from whom, in the opinion of such street commissioners or other proper officers, such fine, penalty of [or] forfeiture can be collected. [92 v. 162.]

**Sec. (2664—4) R. S. § 4. [Labor upon highways within road district; who liable; exemptions.]** All male persons between the age of twenty-one and fifty-five years, able to perform or cause to be performed the labor herein required, except every honorably discharged soldier who served in the United States army during the actual war, pensioners of the United States government, acting and contributing members of companies, troops and batteries of the Ohio national guard during their membership, and any person who is a member of any fire engine, hook and ladder, hose, or other company, for the extinguishment of fire or the protection of property at fires, under the control of the corporate authorities of any municipal cor-

poration, and who receives no pay for such services during the time he may continue an acting member of such company, shall be liable annually, to perform two days' labor on the highways, under the direction of the street commissioner or road superintendent of the road district in which he resides.<sup>1</sup> [1906, April 16, 98 v. 328; 92 v. 162; R. S. of 1880, § 4717.]

(1) **Validity.**—This and succeeding sections are nearly identical with former §§ 4717 to 4728 R. S. § 4717 held constitutional. *Dennis v. Simon*, 51 O. S. 233.

**Sec. (2664—5) R. S. § 5. [Payment of money in lieu of labor.]** But if a person, being warned as hereinafter provided, pay to the street commissioner or the road superintendent in whose district he resides the sum of three dollars within three days after being notified by the street commissioner or road superintendent, the same shall be received in lieu of the two days' labor, and the same shall be paid by such street commissioner or road superintendent to the municipal treasurer or to the township treasurer, as the case may be, and placed in the fund for the improvement of the roads in the township or municipality in which such person resides. [1906, April 16, 98 v. 328; 92 v. 162; R. S. 1880, § 4717.]

**Sec. (2664—6) R. S. § 6. [Ordering out of persons liable; penalty for failure to obey order, etc.]** Each street commissioner or road superintendent shall order out every such person resident in his district between the fifteenth day of April and the first day of July annually, and direct him to do and perform the work aforesaid on the public roads within the district; the order shall be given to each person at least two days prior for the performance of the labor, either personally, or by written notice left at his usual place of abode; and if any person so notified who is liable to perform such labor, refuses or neglects to attend, by himself or substitute, to the acceptance of the street commissioner or road superintendent, or having attended, refused to obey the directions of the street commissioner or road superintendent, or spend the time in idleness or inattention to the duties assigned him, he shall forfeit and pay the sum of one dollar for every such offense, and shall further be liable in all cases of non-attendance, to the amount allowed for two days' work, to be recovered by action before a justice of the peace of the proper township, at the suit of the street commissioner or road superintendent within whose district he resides. [1906, April 16, 98 v. 329; 92 v. 162; R. S. 1880, § 4721.]

**Sec. (2664—7) R. S. § 7. [Non-exemption against execution.]** The defendant shall be entitled to any exemption under any of the laws of this state against execution issued on any judgment and the costs secured under the provisions of this chapter.<sup>1</sup> [1906, April 16, 98 v. 329; 92 v. 162.]

(1) This refers to the chapter on "Streets" formerly chap. 13, Div. 8, Title XII., §§ 2640 to (2664-14) R. S., of which those sections not repealed, are retained by § 28 of the Code.

**Sec. (2664—8) R. S. § 8. [Non-release by neglect to order out; directions governing time of performance.]** No person shall be released from performance of labor on the public highway by reason of neglect of any street commissioner or road superintendent to order him out on or before the first day of July. The trustees of any township or the board of public service of any municipality may direct the time when the labor shall be performed, and shall cause all road superintendents or street commissioners, as the case may be, in their respective townships or municipalities, as the case may be, to perform all work on the public roads in such a manner and in such time and at such places as the township trustees or the board of public service of the municipality may direct. [1906, April 16, 98 v. 329; 92 v. 162; R. S. 1880, § 4722.]

**Sec. (2664—9) R. S. § 9. [Production or non-production of certificate in case of removal.]** If a person removed from one district to another between the first day of April and the fifteenth day of November who has prior to such removal, performed the whole or any part of the labor aforesaid, or in any other way has paid the whole or any part of the amount aforesaid in lieu of such labor, and produce a certificate of the same from the street commissioner or road superintendent of the proper district, such certificate shall be a complete discharge for the amount therein specified; but without producing such certificate he shall be required to perform two days' labor, or such part thereof as he has not performed under the direction of the street commissioner or road superintendent. [1906, April 16, 98 v. 329; 92 v. 162; R. S. 1880, § 4723.]

**Sec. (2664—10) R. S. § 10. [Appearance with required implements, etc.]** Any person called upon to perform labor upon the public roads and highways under the provision of this chapter shall by himself or substitute, appear at the place appointed by the street commissioner or road superintendent at the hour of seven o'clock in the forenoon with such necessary tools and implements as the street commissioner or road superintendent may direct; and the street commissioner or road superintendent may, if necessary for the improvement of the road, require any person owning the same to furnish a team of horses, mules, or oxen, and wagon, cart, plow, or scraper, to be employed and used on the roads under the direction of the street commissioner or road superintendent. [1906, April 16, 98 v. 330; 92 v. 162; R. S. 1880, § 4723.]

**Sec. (2664—11) R. S. § 11. [Residence.]** For the purposes provided for in the preceding sections, the residence of any



person who has a family shall be held to be where his family resides, and the residence of any (other) person shall be held to be where he boards in any road district. [92 v. 162; R. S. of 1880, § 4725.]

**Sec. (2664—12) R. S. [Collection of fines, etc.]** Road superintendents or street commissioners within their respective districts, shall collect, by suit or otherwise, all fines, forfeitures, and penalties arising and accruing under the provisions of this chapter, unless the collection thereof is otherwise herein provided for; and they are hereby required before their settlement with the township trustees, to prosecute to final judgment all persons neglecting or refusing to comply with the provisions of this chapter, from whom such fine, forfeiture, or penalty, in the opinion of the municipal board of public service or township trustees, can be collected by execution; and the judgments, if not paid together with the costs thereon, shall remain and be in force against the judgment debtor, as other judgments at law. And the costs incurred by any road superintendent in any suit brought under this chapter, when the same is not collected from the defendant, shall be paid by the trustees of the township out of the township general fund; if the costs be incurred by any street commissioner in any suit brought under this chapter, when same is not collected from the defendant, shall be paid by the municipality out of the municipal general fund. [1906, April 16, 98 v. 330; 92 v. 162; R. S. 1880, § 4726.]

**Sec. (2664—13) R. S. [Disposition of moneys collected; reports; prosecution of delinquents; day labor may be employed.]** Street commissioners and road superintendents shall pay into the road fund of the municipality or of the township in which such street commissioner or road superintendent is employed, all money by them collected; and all fines and forfeitures sued for and recovered under the provisions of this chapter, shall be paid by the justice of the peace or constable collecting the same on demand, to the street commissioner or road superintendent of the road district wherein the fine or forfeiture accrued, and all road superintendents and street commissioners shall render an account to the trustees or to the board of public service of the municipality, as the case may be, at the annual settlement of all moneys received by them and paid into the municipal or township treasury, and all judgments that remain unpaid and the name of the judgment debtor, and the justice before whom such judgments were obtained, and the amount thereof, and the trustees shall make such order as to the prosecution of suits by the road superintendents or street commissioners, as the case may be, of the proper districts, against such delinquents, as in the judgment of the trustees the interest of the township may require. The

township trustees of any township or the board of public service of any municipality may, for the benefit of the roads and highways, employ day labor at a rate not to exceed seventeen and one-half cents per hour for each hour actually employed and for the employment of teams at a rate not exceeding thirty-five cents per hour for each hour actually employed, to be paid out of the road fund of the township or municipality in which said work is performed as other bills are paid. [1906, April 16, 98 v. 330; 92 v. 162; R. S. 1880, § 4727.]

**Sec. (2664—14) R. S. § 14.** Repealed, 98 O. L. 341.

(f) *Street Railways.*<sup>1</sup>

**Sec. 3437. R. S. [Where street railways may be constructed.]** Street railways<sup>2</sup> with single or double tracks, sidetracks, and turnouts, may be constructed or extended within or without, or partly within and partly without, any municipal corporation or unincorporated village; and offices, depots, and other necessary buildings for such railways may also be constructed. [67 v. 10, § 1; (S. & S. 135).]

(1) **Other street railway laws.**

—For other laws relating to street railways in municipal limits, see §§ 3439 to 3445 R. S., inclusive, and §§ 2503 to 2505e R. S., inclusive, under same heading in Part II. See also § 7 (paragraphs 9 and 28) of the Code.

(2) **Definition.**—A street railway is a railway constructed upon streets or highways and for the purpose of facilitating the use thereof by the public in the transportation of persons and property. *State v. Dayton Traction Co.*, 18 C. C. 490.

Steam railroads and electric railways are classified and recognized as separate and distinct from each other by the statutes of Ohio, and statutes relating to and regulating the former are inapplicable to the latter unless an intention to the contrary clearly appears. *Dayton & U. Ry. Co. v. Traction Co.*, 26 C. C. 1.

But while a railroad and a street railway are distinct and different things, the distinction is not that one is for the transportation of both persons and freight and the other for the carrying of passengers only. *State v. Dayton Traction Co.*, 18 C. C. 490; 64 O. S. 272. See also, as to distinction, *Dayton & U. Ry. Co. v. Traction Co.*, 26 C. C. 1; *Cleveland & Cincinnati R. Co. v. Cincinnati*, Cin. Court Index, Vol. 10, No. 32 (aff'd 66 O. S. 639); *Traction Co. v. Traction Co.*, 47 B. 854.

It is immaterial what the motive power is where it is not steam, and that the cars carry freight and mail, if they stop at any point for passengers and the rails conform substantially to the grade of the highway. *Dietz v. Traction Company*, 4 N. P. 399.

Suburban and interurban railroads are street railways within the

meaning of laws on street railways. C. & H. Electric Street Railway Co. v. C. H. & I. Railroad Co., 21 C. C. 391; C. L. & A. St. Ry. v. Lohe, 68 O. S. 101; C. C. C. & St. L. Ry. Co. v. U. B. & N. Ry. Co., 26 C. C. 180. See also § 2780-17, where suburban and interurban railroads whether operated by electricity, animal or other motive power are classed as street railroads. But see *Weber v. Elec. Ry. Co.*, 13 Dec. 194; *Matthews v. Traction Co.*, 13 Dec. 311 (25 C. C. 652). The rules of negligence, however, which apply to ordinary street railways are applicable to interurban railroads only when running within municipality; when running in open country on track like steam railroad track and at high rate of speed the rules of negligence applicable to steam railroads should apply. C. L. & A. St. Ry. v. Lohe, 68 O. S. 101, 110.

A traction company is a street railway company if organized for purpose of operating interurban electric road. *H. G. & C. Traction Co. v. Traction Co.*, 47 B. 854. So a grip cable road was held to be a street railroad. *Clement v. Cincinnati*, 16 B. 355.

Street railways may carry freight.—*State v. Dayton Traction Co.*, 64 O. S. 272.

**Not an additional burden.**—A street railroad is not an additional burden upon the streets of a municipality requiring compensation to abutting property owners. *St. Ry. v. Cumminsville*, 14 O. S. 523; *Oviatt v. Akron St. R. R. Co.*, 2 N. P. 84; *Glidden v. Cincinnati*, 30 B. 213; *H. G. & C. Traction Co. v. Parish*, 67 O. S. 181; *State ex rel. v. Columbus Ry. Co.*, 24 C. C. 609; *Detroit v. Railway Co.*, 56 Fed. 867; *Detroit Railway Co. v. Detroit*, 64 Fed. 628; *Akron, etc., Co. v. Erie Ry.*, 28 C. C. 36; 7 C. C. (N. S.)

199; *C. C. C. & St. L. Ry. Co. v. Railway Co.*, 26 C. C. 180 (aff'd 73 O. S. 364); but see *Weber v. Electric Railway Co.*, 13 Dec. 194; *Anderson v. Columbus*, 14 Dec. 180; 1 N. P. (N. S.) 541. It is not an additional servitude though allowed any motive power other than animal and permitted to carry freight. *Dietz v. Traction Co.*, 4 N. P. 399; and changing of motive power to electricity does not make a railway an additional servitude. *Pelton v. East Cleveland Railroad*, 22 B. 67. The poles and wires used in putting electric railway on street do not necessarily constitute a new servitude. *Simmons v. Toledo*, 8 C. C. 535, 558 (aff'd 31 B. 367); and where railway is properly located the company is not liable for injury to trees made necessary by construction of road. *Keefe v. Ry. Co.*, 8 N. P. 466.

Except for statutory requirements of consent municipal authorities can grant the right to use the streets without such consent. *Transit Co. v. Traction Co.*, 12 Dec. 1; *H. G. C. Traction Co. v. Parish*, 67 O. S. 181.

But while a street railway is not an additional servitude on a street entitling the abutting owner to compensation, under ordinary circumstances, yet where the owner is deprived of the means of ingress and egress to his property and the same is made inconvenient and burdensome in a special way by the construction of railway, his property rights are invaded and he is entitled to compensation. *Akron, etc., Ry. Co. v. Keck*, 23 C. C. 57; *Street Railway v. Cumminsville*, 14 O. S. 523; *Bellaire, etc., Street Railway Co. v. Smith*, 41 B. 212. But such rights of abutting owners are not invaded by changing street railway from single to double track even though this prevents wagons from



standing at right angles to curb while cars are passing. *Miller v. Railway Co.*, 13 Dec. 418.

And if from the peculiar nature of the abutting owner's business, his trade is impaired or his property rendered less desirable by the construction of the street railway, there being no change of grade or unnecessary interference with the abutter's easement, this is *damnum obsequē injuria*. *Ireton Bros. v. Traction Co.*, 2 N. P. (N. S.) 317.

As to the case of an interurban railway, constructed on "T" rails, on the side of a highway outside of municipality, see *Schaaf v. Railway Co.*, 66 O. S. 215.

**Character of occupation of streets.**—As to correlative rights of vehicles and street railways in streets, see *Lake Shore Railway Co. v. Majewski*, 25 C. C. 55; *Toledo Electric St. Ry. Co. v. Westenhuber*, 22 C. C. 67. As to rights of pedestrians and vehicles in streets where such are used by street railways in reference to questions of negligence, see *Toledo, etc., Railway Co. v. Gilbert*, 24 C. C. 181; *Cincinnati Street Ry. Co. v. Snell*, 54 O. S. 197; *Cain v. Traction Co.*, 13 Dec. 591. As to rights of street railway company and abutting owners to occupy street exclusively for temporary purposes, see *Miller v. Railway Co.*, 13 Dec. 418.

**Municipality cannot construct.**

—It was held that a municipality has no authority to construct or operate a street railway. *Cleveland v. Railway Co.*, 3 C. C. (N. S.) 563, 23 C. C. 373.

**Municipal power to grant right,** to construct street railway, independent of statute, considered, see *Hattersly v. Waterville*, 4 C. C. (N. S.) 242, 26 C. C. 226. But where there are statutory requirements, grant must be made in accordance with them and they are

mandatory. *Horstman v. Street Railway Co.*, 14 Dec. 545, 551; *Louisville Trust Co. v. Cincinnati*, 11 O. F. D. 112; *Raynolds v. Cleveland*, 2 C. C. (N. S.) 139, 24 C. C. 215.

**Character of grant.**—The right to construct a railway in the street is a privilege or franchise granted by the state, and the fact that the privilege is not to be exercised until municipal authorities consent does not change the source of power, but is merely a condition to the exercise of the privilege. *State ex rel. v. Columbus Railway Co.*, 24 C. C. 609, 627; 1 C. C. (N. S.) 145. The grant does not exclude another grant for use of unoccupied portion of street. *H. G. & C. Traction Co. v. Transit Co.*, 69 O. S. 402.

The street railway company, granted the right to use a particular portion of a street, does not acquire the fee to the soil of that portion, but it does acquire a franchise, and easement, which is its private property; it is more than a license, it is a vested property right, carrying with it the right to exclusive user, so far as consistent with the welfare and convenience of the general public. *Ib.*

**Power of eminent domain,** is not impliedly given by this section to street railway companies, nor do such companies have this power under general steam railroad laws. *Columbus, etc., Traction Co. v. Marriott*, 47 B. 357. For statute giving limited power of eminent domain to interurban railroad companies within municipalities, see R. S. § 2505b-1, p. 702.

**Railway through park.**—As to the right of a municipality to grant a railway route through a park. See *Mathers v. Cincinnati*, 3 B. 551; *Cleveland, etc., Ry. v. Barriss*, 33 B. 314 (Supreme Court unreported).

**Sec. 29. [Who may grant authority to construct street railway; proviso.]**<sup>1</sup> The right so to construct or extend <sup>2</sup> such railway as provided in section 3437 Revised Statutes of Ohio, within or beyond the limits of a municipal corporation can be granted only by the council thereof,<sup>3</sup> by ordinance, and the right to construct such railway within or beyond the limits of an unincorporated village can be granted only by the county commissioners, by order entered on their journal; and after said grant or renewal of any grant shall have been made, whether by general or special ordinance, or by the order of the county commissioners, neither the municipal corporation nor the county commissioners shall release the grantee from any obligations or liabilities imposed by the terms of said grant or renewal of a grant during the term for which said grant or renewal shall have been made.<sup>4</sup> Provided, that no authority shall be given by such municipal or county authorities, to occupy the track, whether single or double, or other structure, of any existing street railways for more than one-eighth of the entire distance between the termini of the route, as actually constructed, operated and run over, of the company or individual to whom such grant is made;<sup>5</sup> except, however, in granting permission to extend existing routes in cities, such cities, and the companies owning such route, shall have the same rights and powers they have under the laws and contracts now existing; and that no extension of any street railroad located wholly without any such city, or of any street railroad wherever located, which has been or shall be built in pursuance of a right obtained from any source or authority other than a municipal corporation, shall be made within the limits of such city, except as a new route, and subject to the provisions of section 2501 of the Revised Statutes of Ohio and section 30 of this act.<sup>6</sup>

(1) **Old section.**—This section is practically a re-writing of § 3438 R. S. (repealed) omitting all the references to grades and classes of cities and making the provisions general.

(2) **Extension.**—A marked distinction is drawn between an original grant for construction and a grant for an extension of a street railway. In the case of an original grant for construction, the grant can

be made only upon publication of notice of pendency of the application and to the company offering to carry passengers at the lowest rate of fare; the grant of a right to extend tracks can only be granted to a company owning or having the right to construct a railroad, and there is no bidding for the grant or notice of the application. *Day v. Railway Company*, 27 C. C. 60; 5 C. C. (N. S.) 393; *C. C. C. & St. L. Ry. Co. v. U. B. & N. Railway Company*, 26 C. C. 180. See also *Belle v. Glenville*, 27 C. C. 181; 5 C. C. (N. S.) 461 (aff'd 73 O. S. 392.)

Extension may be granted beyond the termini named in the articles of incorporation of the company. *Sims v. St. Railroad*, 37 O. S. 556.

Extension need not run in the general direction of the original route or begin at one of the original termini. *Cincinnati v. Cincinnati St. Railway*, 31 B. 308; *Belle v. Glenville*, 27 C. C. 181; 5 C. C. (N. S.) 461 (aff'd 73 O. S. 392.).

An extension may be along other streets and not in a straight line. *Sommers v. Cincinnati*, 8 Rec. 612.

An extension granted for a period extending beyond remaining period of grant of original route does not extend grant of such original route, and the extension is valid only during remaining period of original grant. *Cleveland Elec. Ry. Co. v. Cleveland*, 14 O. F. D. 513; 3 O. L. R. 75.

An extension for an electric railway is not invalid because the original grant was for a railway using horses as motive power. *Belle v. Glenville*, 27 C. C. 181; 5 C. C. (N. S.) 461 (aff'd 73 O. S. 392.).

An ordinance granting the extension is not an act conferring corporate power. The corporate power is conferred by the statute under which the company is incorporated and the ordinance is merely a permit. *Sims v. St. Railroad Co.*, 37 O. S. 556.

**Consents.**—In the case of consents obtained for the original construction of a street railroad, they enure to the benefit of the lowest bidder, no matter from whom obtained; but consents obtained for the extension of street railways enure to the benefit only of the railway specified. *Day v. Railway Co.*, 27 C. C. 60; 5 C. C. (N. S.) 393.

**Beyond city limits.**—An ordinance

granting extension along highways outside the city limits merely confers the power and does not dispense with the necessary agreement with the county commissioners, or condemnation. *Railroad Co. v. Commissioners*, 56 O. S. 1; *Richland County v. Citizens' Electric Railway Co.*, 9 C. C. 183.

(3) **Council.**—The grant by council must be made directly to the grantee, and power to make the grant cannot be delegated. *State ex rel. v. Bell*, 34 O. S. 194.

Council was held under the former laws to include trustees of hamlets. *Annexation to Newburgh*, 15 C. C. 78, 80.

(4) **Provision unequivocal.**—A provision such as this is unequivocal and forbids any release of what is due the city by its officers and in the face of such a statute neither the principles of account stated nor of accord and satisfaction based upon receipt of a less amount than is due have any application. *Cincinnati Street Railway Co. v. Cincinnati*, 8 N. P. 80.

(5) **Extension over other tracks.**—Before the limitation as to length of extension over other tracks, it was held municipality had general power to grant right to one company to run over tracks of another company, compensation being paid the company already occupying the street. *Sims v. St. Ry. Co.*, 37 O. S. 556; *Broadway St. Ry. v. Brooklyn St. Ry.*, 10 B. 72.

**How determine length of track.**—The trackage of a railway over its entire route and not merely that part within the city may be considered in determining the length of track of railway already in that city that may be used. *State v. Electric Street Railway*, 19 C. C. 79.

**Right to "straddle" tracks** of another company may be given, as well as right to occupy track, but compensation must be paid first company. *H. G. & C. Traction Co. v. Transit Co.*, 69 O. S. 402.

**Appropriation of track.**—After council has granted a company the right to use part of the track of another company, if the two companies do not agree, appropriation proceedings may be taken to fix the compensation. *Street Ry. v. Street Ry.*, 50 O. S. 603.

For matters relating to appropriation of part of track of another



company, see notes to § 3440 R. S. in Part II.

(6) **Construed with other laws.** It was held that § 3438 R. S. must be construed with other laws relating to the same subject. *R. R. Co. v. Commissioners*, 56 O. S. 1, 7. See also *Hattersly v. Waterville*, 26 C. C. 226, 229; 4 C. C. (N. S.) 242 (aff'd 74 O. S. —.)

It was held that §§ 3437, 3438, 3439 *et seq.* R. S. refer to street railways and extensions wherever located; §§ 2501 to 2505 R. S. relate wholly to lines and extensions within municipalities, § 2505 R. S. relating solely to extensions of such

lines. Where there is a conflict as to municipal lines or extensions, the special provisions of §§ 2501 to 2505 R. S. must govern. *C. C. C. & St. L. Ry. Co. v. U. B. & N. Ry. Co.*, 26 C. C. 180; 5 C. C. (N. S.) 583 (aff'd 73 O. S. 364).

**Annexation of territory.**—As to whether the extension must be as a new route when the original grant was made by county commissioners, but the territory through which it ran was subsequently annexed to the municipality, see *Belle v. Glenville*, 27 C. C. 181; 5 C. C. (N. S.) 461 (aff'd 73 O. S. 392).

**Sec. 2501 R. S. [Terms of condition of construction and operation to be fixed by council; renewal of grant.]** No corporation, individual or individuals shall perform any work in the construction of a street railroad, until application for leave<sup>1</sup> is made to the council in writing, and the council by ordinance<sup>2</sup> shall have granted permission, and prescribed the terms and conditions upon, and the manner in which the road shall be constructed and operated, and the streets and alleys which shall be used and occupied therefor, but the council may renew<sup>3</sup> any such grant at its expiration upon such conditions as may be considered conducive to the public interest. [92 v. 206; 84 v. 40; *Rev. Stat.* 1880; 66 v. 217, § 411; 76 v. 156, § 4; (*S. & S.* 137; *S. & C.* 1560).]

(1) **Application for leave.**—That the application for grant is filed before the company is fully incorporated, does not make it invalid or give ground for enjoining grant. *Sloane v. People's Elec. Ry.*, 7 C. C. 84.

The application may be in the alternative, leaving the city to choose between two routes. *Simmons v. Toledo*, 5 C. C. 124.

Presentation of ordinance to council by company was held to be a sufficient application. *Sanfleet v. Toledo*, 10 C. C. 460. (Affirmed, 54 O. S. 620.)

(2) **Ordinance to construct.**—*Preliminary ordinance* designating the route and directing advertisement for bids is not an ordinance creating a right or granting a franchise or involving an expenditure of money. *State ex rel. v. Henderson*, 38 O. S. 644.

An ordinance establishing the route was held not to be necessary,

in *Sloane v. People's Electric Ry.*, 7 C. C. 84.

**Construction of ordinance.**—The grant by a city to a street railway company to lay its tracks in the street is to be strictly construed and a doubt is fatal. *Hamilton, etc., Electric Transit Co. v. Hamilton*, 1 N. P. 366.

The right to have necessary side-tracks, etc., and other appliances was held not to include the right to have a transfer house in the middle of the street. *Ib.*

Permission to build a temporary transfer house will not confer the right to build a permanent structure. *Ib.*

Construction of ordinance requiring railway company to pay for pavement already laid on street, such proportion of cost as the width occupied by track and one foot on each side, bears to entire width of roadway. *U. M. & C. Ry. Co. v. Columbus*, 16 Dec. 102; 3 N. P. (N. S.) 438.

Construction of ordinance renewing previous grant, see *Akron v. Traction & Light Co.*, 27 C. C. 536; 6 C. C. (N. S.) 445.

When the provisions of the ordinance are plain and unambiguous there is no room for a practical construction by conduct of the parties. *Cincinnati v. Street Railway Co.*, 6 N. P. 140.

An ordinance providing that a street railway shall pay annually \$4 per lineal foot on each car run does not mean on the average numbers of cars run, but is to be strictly construed. *Ib.*

Statement rendered by the company as to cars run and payment pursuant thereto, do not constitute account stated or settled or accord and satisfaction, but only a payment on account. *Ib.*

An ordinance requiring a percentage of all earnings to be paid to the city and fixing a sum per lineal feet on each car, construed. *Cincinnati v. Mt. Auburn Cable Railway*, 28 B. 276. See also *Cincinnati v. Cincinnati Incline Plane Railway Co.*, 30 B. 321.

The fact that a railway route branches into two directions does not make it two routes. *Aydelott v. Cincinnati*, 11 C. C. 11.

A street railway grant providing that the railway should be built within six months from the time the city had completed certain grading, interpreted. *Toledo v. Toledo Ry. & Light Co.*, 2 C. C. (N. S.) 97.

**Character of ordinance.**—An ordinance duly accepted by the city constitutes a contract between the railway and the city. *Cincinnati v. Street Railway Co.*, 6 N. P. 140; *State v. Ry.*, 15 C. C. 200.

The grant cannot be exclusive to one company. *Toledo, etc., Railway Co. v. Toledo Electric Street Railway Co.*, 6 C. C. 362 (affirmed, 50 O. S. 603).

It cannot be upon streets to be thereafter designated. *Cincinnati Street Railway Co. v. Smith*, 29 O. S. 291.

It cannot grant a route in the alternative, leaving the company to choose. *Sommers v. Cincinnati*, 8 Rec. 612.

It is not void because the person to whom it is granted is designated as trustee. *Simmons v. Toledo*, 5 C. C. 124.

Grant is not invalid because it covers only part of the route described in the application. *Simmons v. Toledo*, 5 C. C. 124.

Section gives no power to pass an ordinance forbidding cars without conductors. *Thornhill v. Cincinnati*, 4 C. C. 354.

If grant to street railway fixes the fare and provides that it shall be the rate during the existence of the ordinance, unless the express power to change the fare is reserved, it cannot be changed by the municipal authorities. *Cleveland City Ry. v. Cleveland*, 12 O. F. D. 635.

Grants to street railway companies are protected by the provisions of the U. S. Constitution against impairment of contracts. *Ib.*

Where a street railway company has a franchise in which no provision is made for either single or double trolley system and the company adopts single trolleys, it cannot subsequently be required to change to a double trolley system to avoid injury to public or private property by electrolysis. *Dayton v. City Ry. Co.*, 12 Dec. 258.

Effect of changing the proposed route after advertisement for bids. *Raynolds v. Cleveland*, 24 C. C. 215; 2 C. C. (N. S.) 139.

**Conditions.**—Illegal condition, not separable, renders the whole grant invalid. *Cincinnati Street Railway v. Smith*, 29 O. S. 291.

Construction of a grant containing the condition that the company should keep the streets between its tracks in repair. See *Columbus v. St. Railroad*, 45 O. S. 98.

Ordinance cannot impose conditions that the company shall not

exercise one of its corporate powers. Thus a regulation that it shall not carry freight is void. *State v. Dayton Traction Co.*, 18 C. C. 490.

A provision requiring arbitration between railway company and its employees held invalid. *Raynolds v. Cleveland*, 13 Dec. 125; 24 C. C. 215; 2 C. C. (N. S.) 139.

Requirement that railway company should pave between rails does not make the company liable to the city for any part of damages awarded to property holders for a paving improvement. *Street Railway v. Dayton*, 1 Dayton, 165.

Upon failure to comply with the conditions in a grant council may order tracks to be torn up without legal proceedings where an ordinance contained the words "or if in their opinion expedient have the tracks removed from the street." *Stewart v. Ashtabula*, 36 B. 46.

Where ordinance provides for notice before forfeiture, notice must be given before council can declare rights forfeited. *Akron v. Traction & Light Co.*, 27 C. C. 536; 6 C. C. (N. S.) 445.

Ordinance may provide for transfers. *Reynolds v. Cleveland*, 8 C. C. (N. S.) 278.

**Rights of grantee.**—Where a city council has, by ordinance, legally granted to one street railroad the right to construct its railway over a particular part of a designated street, and such company has accepted the grant and taken possession of the right of way, such company acquires a vested property right in the nature of a franchise or easement to the particular portion of the street designated in the grant, and such grant carries with it all right of acquisition, occupancy and use of that portion of the street for the purposes for which it was granted so far as consistent with the welfare and convenience of the general

public. *H. G. & C. Traction Co. v. Transit Co.*, 69 O. S. 402.

Another company claiming under a subsequent grant of the council to use the same right of way by straddling the tracks of the former company, cannot enter and take possession of the right of way granted to the first company without appropriating the right so to do, and paying compensation therefor. *Id.*

A company having grants of several routes cannot combine any of the streets in such routes into a new route, without a new grant complying with statutes. *Horstman v. St. Ry. Co.*, 14 Dec. 545. Where one company has been granted the right to put down a double track and another the right to put down a single track on same street, a court cannot compel them to combine so as to have two instead of three tracks. *Hamilton St. Ry., etc., Co. v. Transit Co.*, 5 C. C. 319.

#### **Remedies in case of illegal grants or violations of ordinance.**

—Injunction *pendente lite* will not be allowed to prevent railway company from acting under an ordinance claimed to be illegal because an abuse of corporate power of the city, where it appears that the ordinance is beneficial to the city. *Ross v. Columbus*, 8 N. P. 420.

An abutting owner suing in his right as such and not as a taxpayer cannot attack the grant except for want of consents. *Glidden v. Cincinnati*, 30 B. 213; *Barney v. Railway Co.*, 30 B. 286.

Abutting owner cannot enjoin on ground that street railway is a nuisance. *Dietz v. Traction Co.*, 4 N. P. 399; *Sanfleet v. Toledo*, 10 C. C. 460.

Courts will not interfere with the discretionary power of council to



grant the use of streets to any street railway company, if beneficial to the public, in the absence of fraud. *Sims v. Street R. R. Co.*, 37 O. S. 556.

It was held a competing railway cannot object to non-compliance with the provisions of §§ 2501, 2502 R. S. Toledo, etc., *Ry. v. Toledo Elec. St. Ry.*, 6 C. C. 362.

As to injunction against grant, see further, *Buning v. Cincinnati Street Railway*, 1 C. C. 323; *Cincinnati St. Ry. v. Smith*, 29 O. S. 291; *Gallagher v. Johnston*, 31 B. 24.

As to enjoining contract between two companies for carrying cars over tracks, see *Rogers v. Railway Co.*, 12 Dec. 136.

Injunction will lie at suit of a taxpayer to prevent a railway corporation from using for purposes not authorized by its grant, rights and privileges in the streets. *Rogers v. Ry.*, 12 Dec. 136.

So, operation of street railway without authority of law, or under unconstitutional law, may be so enjoined. *Horstman v. Street Ry. Co.*, 13 Dec. 670; 1 N. P. (N. S.) 25; 14 Dec. 545; and such operation is a continuing nuisance, and the statute of limitations does not apply. *Ib.*

A railway company using a single trolley system under municipal grant not specifying the system, will not be compelled by a court of equity to change to a double trolley system, because of damage to water pipes, where there is a conflict in the testimony as to whether or not a single trolley system is a proper one for street railways. *Dayton v. Railway Co.*, 26 C. C. 736; 6 C. C. (N. S.) 41.

Liability of railway company for injury to water pipes from single trolley system, see *Ib.*

Street railway grant cannot be enjoined unless defects and irregularities in proceedings are plainly jurisdictional, or of such a nature that the equity and justice of the case demand the interference of the court. *Sloane v. Ry. Co.*, 7 C. C. 84.

Specific performance is not the proper remedy to compel the company to carry out the terms of its franchise. *Matthews v. Traction Company*, 25 C. C. 652; 5 C. C. (N. S.) 179 (aff'd 70 O. S. 436).

As to whether *quo warranto* will lie for violation of franchise from municipality, see *State ex rel. v. Toledo Ry. & Light Co.*, 23 C. C. 603; 3 C. C. (N. S.) 285; reversed, 73 O. S. 356.

As to when forfeiture of franchise will be granted, see *Toledo v. Toledo Ry. & Light Co.*, 2 C. C. (N. S.) 97; 25 C. C. 441; *State ex rel. v. C. M. & L. Traction Co.*, 5 C. C. (N. S.) 167.

As to when court will grant mandatory injunction to compel specific performance of provision for repair in franchises, see *Milford v. Traction Company*, 26 C. C. 271; 4 C. C. (N. S.) 191 (aff'd 71 O. S. 529).

(3) **Renewal of grant.**—*What is.* Leave to change the motive power to electricity is not an implied renewal. *Cincinnati v. Street Ry. Co.*, 30 B. 321 (affirmed, 52 O. S. 609).

Consolidation into one system and ordinance imposing transfer obligation do not operate to prolong life of any prior grant. *Cleveland Elec. Ry. Co. v. Cleveland*, 14 O. F. D. 513; 3 O. L. R. 75.

Extension of time of grant by implication is not favored. *Ib.*

*Before expiration of grant.*—Renewal may be made before the original grant has expired. *State ex rel. v. East Cleveland Ry.*, 6 C. C. 318; *Cincinnati v. St. Ry.*, 31 B. 308; *Belle v. Glenville*, 27 C. C. 181; 5 C. C. (N. S.) 461 (aff'd 73 O. S. 392).

*Longer than legal.*—Renewal for longer period than allowed by law will be valid for the period allowable. *Sommers v. Cincinnati*, 8 Re 612.

*Renewal of grant is a waiver of rights of municipality* because of failure of company to lay tracks as provided in original grant. *Akron v. Traction & Light Co.*, 27 C. C. 536; 6 C. C. (N. S.) 445.

*Consents and competitive bidding.*—Consents of abutting owners not necessary in case of renewal of grant. *State v. East Cleveland Ry.*, 6 C. C. 318; *Pelton v. East Cleveland Ry.*, 22 B. 67. Nor is competitive bidding necessary. *State v. East Cleveland Ry.*, 6 C. C. 318; *Haskins v. Cin. Consol. Ry.*, 4 B. 1126.

*Conditions.*—Renewal may be made on condition that city might allow another company to use the tracks on terms satisfactory to city. In such case court will not interfere, even though part of first company's business would be taken away. *Broadway, etc., Ry. v. Brooklyn, etc., Ry., 10 B. 72.*

FORM OF APPLICATION FOR LEAVE TO CONSTRUCT A STREET RAILWAY.

APPLICATION.

.....19.....  
To the Honorable the council of the city [or village] of.....,  
State of Ohio:

The undersigned hereby request permission to construct, maintain and operate a street railroad in the city [or village] of....., State of Ohio, over, along and upon the following streets: (here describe the route) said railroad to consist of a single [or double] track with the necessary switches, turnouts, curves, loops, Y's, poles, wires and all other necessary fixtures and apparatus and to be operated by electricity or other motive power except steam.

And the undersigned respectfully request your honorable board to take the necessary steps required by law to establish said route and grant said permission.

Respectfully,  
.....

**Sec. 30.** [Proceedings to establish a street railway route; grant not valid for more than twenty-five years.]<sup>1</sup> Nothing mentioned in section 2501 of the Revised Statutes of Ohio shall be done; no ordinance or resolution to establish or define a street railroad route shall be passed, and no action inviting proposals to construct and operate such railroad shall be taken by the council; and no ordinance for the purpose specified in section 2501 of the Revised Statutes of Ohio shall be passed until public notice of the application therefor has been given by the clerk of the corporation once a week, for the period of at least three consecutive weeks in one or more of the daily papers, if there be such, and if not, then in one or more weekly papers published in the corporation;<sup>2</sup> and no such grant as mentioned in section 2501 of the Revised Statutes of Ohio shall be made, except to the corporation, individual or individuals, that will agree to carry passengers upon such proposed railroad at the lowest rates

of fare,<sup>3</sup> and shall have previously obtained the written consent of a majority of the property holders upon each street or part thereof, on the line of the proposed street railroad, represented by the feet front of the property abutting on the several streets along which such road is proposed to be constructed;<sup>4</sup> provided, that no grant nor renewal of any grant for the construction or operation of any street railroad, shall be valid for a greater period than twenty-five years from the date of such grant or renewal;<sup>5</sup> and after such grant or renewal of a grant is made, whether by special or general ordinance, the municipal corporation shall not, during the term of such grant or renewal, release the grantee from any obligation or liability imposed by the terms of such grant or renewal of a grant.<sup>6</sup>

(1) **Old section.**—Old section 2502 R. S. is practically rewritten here, except that reference to recommendation of a board of public works or board of improvements is omitted, and a proviso relating to certain grades and classes of cities is also omitted.

(2) **When publication necessary.**—The wording of § 2502 R. S. was somewhat different from the present code section. The former read: "Nothing mentioned in the next preceding section [2501] shall be done; no ordinance or resolution to establish or define a street railroad route shall be passed, and no action inviting proposals to construct and operate such railroad shall be taken by the council, except upon recommendation, etc., . . . and no ordinance for the purpose specified in said preceding section shall be passed until public notice of the application therefor has been given, etc." . . . Under this language it was held that the operation of the provisions of § 2502 R. S. was restricted to the ordinance for the original construction

of a street railway, and a publication of notice was therefore not necessary, in the case of a renewal of a grant. *State v. East Cleveland R. R. Co.*, 6 C. C. 318, 322; and it was also held that no notice was necessary before the terms and conditions of a grant were made, only the final grant requiring the notice. *Aydell v. Cincinnati*, 11 C. C. 11.

In the new section, by the omission of the reference to the board of improvements, all the clauses of the section up to the words "until public notice, etc.," are made to apply to the provision relating to notice.

**Extensions**, whether notice required, see *C. C. C. & St. L. Ry. Co. v. U. B. & N. Ry. Co.*, 26 C. C. 180.

**Sufficiency of publication.**—One insertion each week on same day of week for three weeks is sufficient. *Smith v. Columbus, etc., Ry.*, 8 N. P. 1; *Simmons v. Toledo*, 5 C. C. 124 (aff'd 30 B. 392, no report.) See also *Early v. Doe*, 16 How (U. S.) 610 and cases cited.

Under former laws, publication for required time, in one newspaper



was sufficient, even though a general city ordinance required such ordinance to be published in two newspapers. *Simmons v. Toledo, supra.*

But, as to present requirement, see § 124 of the Code.

Estoppel of municipality to deny publication, see *Raynolds v. Cleveland*, 8 C. C. (N. S.) 278.

Where franchise was granted after publication of notice legally insufficient, council cannot legalize the grant by a curative ordinance declaring the publication sufficient. *Raynolds v. Cleveland*, 8 C. C. (N. S.) 278.

(3) **Must be to lowest bidder.**—The franchise must be given to one who bids the lowest fares and the grant to one who is not such is void. *Knorr v. Miller*, 5 C. C. 609 (affirmed, 27 B. 64); *Compton v. Johnson*, 9 C. C. 532.

**Who is lowest bidder.**—A bidder who agreed to charge "the lowest price of commutation tickets in packages" is not the lowest bidder. *Cincinnati St. Ry. v. Smith*, 29 O. S. 291.

Council cannot disregard the lowest bid on the ground that the motive of the bidder was obstructive and not *bona fide*. *Knorr v. Miller*, 25 B. 128; 5 C. C. 609 (affirmed, 27 B. 64); every bid is presumed to be in good faith, and the burden is on those who contest it to show the contrary. *Gallagher v. Johnson*, 31 B. 24; the lowest bid cannot be rejected as not in good faith if the bidder intends to comply with it and council may investigate the matter to determine whether the bidder does so intend. *Ib.*

Council should disregard informalities not going to the substance of the bid. *Compton v. Johnson*, 9 C. C. 532.

Council cannot consider that the bid is so low as to be a losing one. *Gallagher v. Johnson*, 30 B. 139.

Irregularities in opening and considering a bid when no time was fixed for the opening and the form of bid was not regulated, are not ground for injunction. *Sloane v. People's Electric Railway*, 7 C. C. 84.

**Bond.**—Council may waive bond required by notice inviting bids if no favoritism is intended thereby. *Sloane v. People's Electric Railway*, 7 C. C. 84.

Informality in the bond is no ground for injunction. *Simmons v. Toledo*, 5 C. C. 124.

A bond by one person not mentioning associates is sufficient, though the bid mention that person and his "associates." *Compton v. Johnson*, 9 C. C. 532; *Gallagher v. Johnson*, 30 B. 139.

Check deposited by bidder will be held liquidated damages and not a penalty, if franchise is not complied with, and will be forfeited to municipality, as provided in resolution. *Hattersly v. Waterville*, 26 C. C. 226; 4 C. C. (N. S.) 242 (aff'd 74 O. S. —).

**When bidding not necessary.**—Where the grant for part of a street railway route fails because the necessary consents were not obtained, the new grant for that portion may be made when the consents are obtained, without further bidding. *Sanfleet v. Toledo*, 10 C. C. 460 (affirmed, 54 O. S. 620.)

Bidding is not necessary in the case of a renewal of a grant. *State ex rel. v. E. Cleveland Railroad*, 6 C. C. 318; see also *Clement v. City*, 16 B. 355 (affirmed Supreme Court, 19 B. 74.)

**Rights of lowest bidder** for a street railway are not enforceable until the franchise ordinance has been passed and its terms and conditions accepted. *Raynolds v. Cleveland*, 13 Dec. 125; 24 C. C. 215; 2 C. C. (N. S.) 139.

**Injunction against contract,** see *Tucker v. Newark*, 19 C. C. 1, 3; *Knorr v. Miller*, 25 B. 128; *Johnson v. West Side St. Ry.*, 10 B. 345; *Mathers v. Cincinnati*, 3 B. 709; *Johnston v. Cincinnati*, 26 B. 223.

(4) **Consents — Character.**—Consents inure to the lowest bidder, no matter for whom obtained. *State v. Bell*, 34 O. S. 194; *Knorr v. Miller*, 5 C. C. 609 (affirmed, 27 B. 64); *Mathers v. Cincinnati*, 3 B. 551.

Property owner giving consent cannot limit it to any one corporation, and if he does so, the limitation is void and the consent inures to the lowest bidder. *Railway Co. v. Day*, 73 O. S. 83; *State ex rel. v. Bell*, 34 O. S. 194.

As to consents to extensions of street railways, however, see section 3339 R. S. and notes, page 704.

Consents do not have to be entered on the records of council or be made a part of the ordinance. *Sanfleet v. Toledo*, 10 C. C. 460. They need not be obtained before the calls for bids and need not be to the particular manner of construction. *Sloane v. People's Electric Railway*, 7 C. C. 84.

Consent of abutting lot owners to the construction of a street railroad are not property rights and cannot be appropriated. *Hamilton G. & C. Traction Co. v. Parish*, 67 O. S. 181.

**How determine majority.**—The majority required is the majority of abutting owners on each separate street. *Cable Ry. v. Neare*, 54 O. S. 153; but see, also, *Rapp v. Cincinnati*, 12 B. 119.

*What consents counted*, see *Simmons v. Toledo*, 8 C. C. 535, affirmed, 31 B. 367 (agent authorized to use his judgment in signing consent; agent's signature of married woman's name in her maiden name; agent signing on oral authority, but see *Rapp v. Cincinnati*, 12 B. 119; signature of son, having charge of property and owning remainder subject to life estate; trustee having control over property with full powers); *Rapp v. Cincinnati*, 12 B. 119; *Ireton Bros. v. Traction Co.*, 15 Dec. 129; (person holding life estate under a will; tenant by curtesy or dower); *Day v. Railway Co.*, 27 C. C. 60; 5 C. C. (N. S.) 393 (consent of wife signed by husband with authority; consent signed by agent authorized; consent signed a year before passage of ordinance, but while a similar ordinance pending; consent signed by vendee under contract to convey; consent signed by agent without authority, but subsequently ratified).

Consents not counted, see *Simmons v. Toledo*, *supra*; *Day v. Railway*, *supra* (signature of husband for himself and wife when wife is owner); *Rapp v. Cincinnati*, *supra*; *Day v. Railway*, *supra* (husband signing for wife; father signing for daughter; president of corporation signing without authority from board of directors; guardian signing for minors; executors with power to sell signing); *Schwab v. Traction Co.*, 13 Dec. 116 (consent of a minor); *Sommers v. Cincinnati*, 8 Rec. 612 (consent by one not owning the property, though afterward ratified by owner).

As to when consent by widow holding dower will be counted, see *Schwab v. Traction Co.*, 13 Dec. 116.

Consent by firm may be counted, though property is not used for firm purposes. *Ib.*

Consent by telegram was held valid. *Ib.*

A tenant in common can be counted for his proportion. *Simmons v. Toledo*, 8 C. C. 535; *Ronnebaum v. Railway*, 29 B. 338; *Day v. Railway*, 27 C. C. 60.

Where owner has consented and afterward sold the property and the buyer does not withdraw signature, it will be counted. *Simmons v. Toledo*, 8 C. C. 535. But where purchaser has no knowledge of previous consent, it is not counted. *Day v. Railway*, 27 C. C. 60; 5 C. C. (N. S.) 393.

Whether council may consent as to municipal property, *quere*. *Rapp v. Cincinnati*, 12 B. 119.

**Conditional consent.**—Power of council to act on the consent is not limited by the condition of the consent as to the time of the completion of the road. *Simmons v. Toledo*, 8 C. C. 535.

Consent for a horse railway is not a consent for an electric railway. *Sanfleet v. Toledo*, 10 C. C. 460. (Affirmed, 54 O. S. 620.)

Consent for one track cannot be used where a double track is proposed. *Roberts v. Easton*, 19 O. S. 78.

Consent on condition that franchise is passed on a particular date is not good if ordinance not passed at that time. *Day v. Railway Co.*, 27 C. C. 60; 5 C. C. (N. S.) 393.

Consents for extension of a specified railway not good for original construction of another railway. *Day v. Railway Co.*, 27 C. C. 60; 5 C. C. (N. S.) 393.

Consent for construction or extension along a certain route is not consent for another and different route, though passing by same property. *Near v. Mt. Auburn Cable Ry.*, 29 B. 171; *Ireton Bros. v. Traction Co.*, 15 Dec. 129. But slight departure from route to avoid difficult curves would not invalidate consent. *Ireton Bros. v. Traction Co.*, 15 Dec. 129; 2 N. P. (N. S.) 317.

**Conclusiveness of council's finding.**—Obtaining the proper number of consents is a condition



precedent to the power of council to authorize the railway. And council's finding that the requisite consents have been given is not conclusive. *Roberts v. Easton*, 19 O. S. 78; *Sommers v. Cincinnati*, 8 Rec. 612; *Day v. Railway*, 27 C. C. 60; 5 C. C. (N. S.) 393.

But where council has determined that the proper consents were given, the burden is on one denying this. *Simmons v. Toledo*, 8 C. C. 535. See, also, *Cincinnati College v. Nesmith*, 2 C. S. C. R. 24; *Iretton Bros. v. Traction Co.*, 15 Dec. 129; 2 N. P. (N. S.) 317.

The rule that the presumption is that council acted with sufficient consents before it, does not extend to the validity of any single consent, where the validity of such consent is attacked; in such case the validity of the consent is to be determined as a fact under the ordinary rules of evidence; and if the consent is by an agent, authority must be shown. *Day v. Railway*, 27 C. C. 60; 5 C. C. (N. S.) 393.

**When necessary.**—Extensions or additional switches of existing railway require consents. *Harner v. Columbus, etc., Railway*, 29 B. 387; *Chambers v. Traction Co.*, 27 C. C. 193; 5 C. C. (N. S.) 298 (aff'd 73 O. S. 346). Consents are necessary for a new track, although there is a double track of another company already on the street. *Sanfleet v. Toledo*, 10 C. C. 460. So, also, where there is a single track already down and it is desired to lay another track on the same street. *Roberts v. Easton*, 19 O. S. 78.

**When not necessary.**—Consents held not necessary for a mere temporary track, the right to lay such track being a revocable license and not a grant. *Mathers v. Cincinnati*, 3 B. 709. Consents are not necessary in the case of a renewal of the grant. *State v. East Cleveland R. R. Co.*, 6 C. C. 318. Consents are not necessary where one company is appropriating the use of parts of the tracks of another company. *Consolidated Street Railway v. Toledo Street Railway*, 6 N. P. 537; *State v. Electric Street Railway*, 19 C. C. 79.

**Purchased consents.**—Consents of the property owners or withdrawal of such consents may be properly induced by the payment of consideration. *Cleveland v. Railway Co.*,

3 C. C. (N. S.) 563; 23 C. C. 373.

"There is no public policy in this state against giving such consent for a valuable consideration, moving from the street railway to such lot owner." *Hamilton G. & C. Traction Co. v. Parish*, 67 O. S. 181; see, also, *Makemson v. Kauffman*, 35 O. S. 444.

**Withdrawal of consents.**—See § 3439a (page 705), relating to withdrawal of consents. And see *Hamilton G. & C. Traction Co. v. Parish*, 67 O. S. 181.

**Right of action for want of consents.**—Where council grants the right to construct a railroad without the consent of abutting owners as required by statute, such owners may enjoin the construction of the road. *Roberts v. Easton*, 19 O. S. 78. Whether *quo warranto* would lie because of failure to secure consents, see *State v. Railway Co.*, 19 C. C. 79. Injunction for want of consents can be brought only by abutting property owner. Action will not lie by taxpayer as such. *Simmons v. Toledo*, 5 C. C. 124; *Sommers v. Cincinnati*, 8 Rec. 612; *Harrison v. Mt. Auburn Cable Railway*, 17 B. 265; *Glidden v. Cincinnati*, 30 B. 213; *Hamilton v. C. & H. Street Railroad*, 5 N. P. 457. Abutting owner can complain only for the want of consents on his own street. *Glidden v. Cincinnati*, 30 B. 213; *Mathers v. Cincinnati*, 3 B. 709; *Barney v. Railway*, 30 B. 286.

Motive of plaintiff in bringing action is not material. *Hamilton G. & C. Traction Co. v. Parish*, 67 O. S. 181. And it can make no difference whether his right is clear or not, only so that it exists. *Ib.*

(5) **Period of grant.**—Renewal of grant for period longer than that allowed by law held valid for legal period. *Sommers v. Cincinnati*, 8 Rec. 612.

Unlimited grants made prior to statutory limitation held perpetual. *State ex rel. v. Columbus Ry. Co.*, 1 C. C. (N. S.) 145; 24 C. C. 609; but see 73 O. S. 363. But such grants are subject to revocation by legislature. *Ib.*

(6) **Release from obligation.**—Such a section as this forbids any release by municipal authorities of amount due the city under its street railway grant, and neither the principles of account stated nor of accord and satisfaction based upon a



less amount than that actually due have any application. *Cincinnati St. Railway Co. v. Cincinnati*, 8 N. P. 80.

But a provision such as this would not prohibit municipal corporation from changing the rate of fare upon proper consideration. *St. Ry. v. Cleveland*, 12 O. F. D. 635. Better accommodation would be a consideration for the modification of

the terms of a grant. *Clement v. City*, 16 B. 355. (Affirmed in Supreme Court, 19 B. 74.) There is nothing to prevent a city council and a street railway company from terminating a grant by agreement previous to its expiration, for good cause, and renewing the grant. *State v. E. Cleveland Railroad Co.*, 6 C. C. 318.

## FORM OF RESOLUTION ESTABLISHING ROUTE AND AUTHORIZING ADVERTISEMENT FOR BIDS.

### RESOLUTION.

Be it resolved by the council of the city [or village] of....., State of Ohio, that the application of....., (here insert name of company or individual) for a grant and permission to construct, maintain and operate a street railroad in the city [or village] of....., State of Ohio, on the route hereinafter described, be received and placed on file and,

Be it resolved, that there is hereby established a street railroad route in the city [or village] of.....over, along and upon the following streets (here define the route) upon which route there may be maintained and operated a single [or double] track street railway with the necessary switches, turnouts, curves, loops, Y's, poles, wires and all other necessary fixtures and apparatus, and to be operated by electricity or other motive power except steam, and to be furnished and equipped as a first class street railway, as may be more particularly provided for in the ordinance making the grant to the successful bidder therefor; and,

Be it resolved, that the grant for the operation of such street railroad over the route herein established shall be for a period of.....years (not more than 25 years) and,

Be it resolved, that a grant for the above period over said route shall be made to the individual, individuals or company which shall agree to carry passengers over said route and from and to all points thereon for the lowest rates of fare and,

Be it resolved, that the clerk of the city [or village] be and he is hereby instructed and directed to give notice by publication of the said application of..... (here insert name of applicant) as required by law, and in said notice to invite bids for the construction, maintenance and operation of a street railroad over said route in accordance with the terms and conditions of this resolution.

Passed....., 19.....  
Attest:

.....

Clerk.

.....

President of Council.

## FORM OF ADVERTISEMENT INVITING BIDS FOR STREET RAILWAY GRANTS.

## LEGAL NOTICE.

City [or village] of....., Ohio.

Notice is hereby given that on the.....day of....., 19..., application was made to the council of....., by....., for permission to construct, maintain and operate a street railroad within said city [or village] over, along and upon the following streets, to-wit: (here describe route) and,

That a street railroad route over, along and upon the above named streets has been established in the manner provided by law, upon which route there may be constructed, maintained and operated for a period of .....years a single [or double] track street railroad operated by electricity or other motive power except steam, and subject to the terms and conditions provided in the resolution establishing said route and directing this advertisement, on file in the office of the clerk of the city [or village] of ....., State of Ohio; and

That bids will be received up to 12 o'clock noon,....., 19..., for the construction, maintenance and operation of a street railroad over said route, subject to the terms and conditions set forth in said resolution and for the lowest rate of fare for transporting passengers along and over said route.

.....

Clerk.

.....

President of Council.

## FORM OF STREET RAILWAY GRANT.

Ordinance No.....

Granting leave and permission to..... to construct, maintain and operate a street railroad over, along and upon certain streets in the city [or village] of....., State of Ohio,

WHEREAS, on the.....day of....., 19 ..., ..... made application in writing to the council of the city [or village] of....., State of Ohio, for the right to construct, maintain and operate a street railroad over, along and upon certain streets in the city [or village] of ....., State of Ohio, hereinafter specifically set forth and,

WHEREAS, on the.....day of....., 19:..., a resolution was duly passed establishing a street railway route over such streets and notice of the establishment of said route and of said application was duly published according to law, and,

WHEREAS,..... [naming grantee] has made a bid for said route, which said bid offers rates of fare which are the lowest rates bid, and has previously obtained the written consent of a majority of the property holders upon each of the said streets or parts thereof on the line of the said proposed railroad represented by the feet front of the property abutting thereon;

*Now therefore, be it ordained* by the council of the city [*or village*] of ..... , State of Ohio.

Sec. 1. That said..... (naming grantee) its successors and assigns be and are hereby granted the right and permission to construct, maintain and operate a single [*or double*] track street railway to be operated by electricity or other motive power except steam, with the necessary switches, turnouts, curves, loops, Y's, poles, wires and all other necessary fixtures and apparatus, over, along and upon the following streets in the city [*or village*] of....., viz: (here insert description of route).

Sec. 2. (Describe character of construction and equipment, agreements as to repairs of streets and other special requirements desired.)

Sec. 3. This grant shall remain in force for the period of..... years from and after its acceptance by..... (name of grantee).

Sec. 4. This ordinance shall take effect and be in force from and after the earliest period allowed by law and after the filing with the city [*or village*] clerk, of the written acceptance thereof by..... (name of grantee).

Passed....., 19.....

Attest:

.....

Clerk.

.....

President of Council.

**Sec. 31.** [Vested rights and contracts already entered into not to be impaired or enlarged by this act; certain unexpired franchises are hereby regranted.] Nothing herein contained shall be construed to impair the rights of abutting property owners, where unnecessary or additional burdens are placed upon the streets by operation of any grants herein authorized to be made, and nothing in this act, or any part thereof, shall be construed to impair or enlarge the rights of any corporation now using the streets of any municipality in the state under authority of any law now or heretofore in force; but all unexpired grants of rights or franchises heretofore made by any municipality, in accordance with the provisions of any statute or act of the general assembly existing at the time when they were made, and which have been accepted and where money has been expended in good faith on account thereof, are hereby regranted for such unexpired portion of the respective periods of the original grants in accordance with the terms and conditions of the same; any law, or part of law, to the contrary notwithstanding.<sup>1</sup>



(1) **Validating grants.**—See, as to curative statute validating *ultra vires* grants of a municipality, Millcreek Valley St. Ry. v. Carthage, 18 C. C. 216; see, also, Hume v. Traction Co., Cincinnati Ct. Index, Aug. 1, 1902; Kumler v. Silsbee, 38 O. S.

445; State v. Hoffman, 35 O. S. 435. Knorr v. Miller, 5 C. C. 609 (aff'd 27 B. 64, 187).

The latter part of this section was held unconstitutional in Horstman v. St. Ry. Co., 1 N. P. (N. S.) 25; 13 Dec. 670.

#### FOURTH. TAXATION.

##### (a) *Levy of Taxes; Restrictions.*

**Sec. 32. [Power of council to levy and collect taxes.]**<sup>1</sup> The council of every municipal corporation shall have power to levy and collect taxes upon all the real and personal property within the corporation for the purpose of paying the expenses of the corporation, constructing all improvements authorized, and exercising all the general and special powers conferred by law.<sup>2</sup>

(1) **Old sections,** 2262, 2263, 2682, 2683, 2684 R. S., repealed. For taxation in hamlets, see § 2681 R. S. in Part II.

(2) **No inherent power to tax.**—A municipal corporation has not the inherent power to tax. It can exercise this power only when clearly delegated to it by statute. Mays v. Cincinnati, 1 O. S. 268; and it is strictly limited to the manner of exercise which the statutes provide. Reed v. Toledo, 18 O. 161, 166.

**Public purpose** — *Legislative discretion.*—Taxes should be levied only for those purposes which properly constitute a public burden. But what is for the public good and what are public purposes and what properly constitutes a public burden are questions which the legislature must decide upon its own judgment and in respect to which it is vested with a large discretion which cannot be controlled by the courts, except, perhaps, where its exercise is clearly evasive, and where, under pretense of lawful authority, it has assumed to exer-

cise one that is unlawful. Walker v. Cincinnati, 21 O. S. 14, 41; and the power of the legislature to authorize local taxation cannot be judicially denied on the ground that the purpose for which it is exercised is not local unless the absence of all local interest is clearly apparent. Walker v. Cincinnati, 21 O. S. 14; State v. Trustees, 20 O. S. 362.

*Payment of debts.*—It is a general principle of municipal law that where a power is granted to a municipality to incur indebtedness, a commensurate power to levy the necessary tax to discharge the indebtedness, is implied. Sec. 2683 R. S. was held to confer power to levy a tax sufficient to satisfy a valid public debt. United States v. Kent, 12 O. F. D. 422; and it is no defense to an action to compel the municipality to pay the interest on bonds issued by it, that it needs all the money it is allowed to raise by statute, to pay its general current expenses. *Ib.*

*For natural gas works.*—Supplying the city with natural gas is a

public use for which the taxing power may be exercised. *State ex rel. v. Toledo*, 48 O. S. 112.

**Uniformity**—*Annexed territory*.—A tax to pay bonds of a village annexed to a city levied on the annexed territory alone, is not void for want of uniformity. *Cleveland v. Heisley*, 41 O. S. 670.

As to levy of municipal tax upon territory newly annexed to the municipality, see *State v. Craig*, 21 C. C. 13.

An incorporated village is the proper party on whose relation an action for a writ of mandamus may be maintained to compel the county auditor to place the municipal tax upon property newly annexed to the village. *State v. Craig*, 21 C. C. 13.

**General and special statutes**.—See *Findlay Gas Light Co. v. Findlay*, 2 C. C. 237; *Dunham v. Ope*, 3 C. C. 274, relating to power of council under the former general statutes relating to taxation, where there were special statutes covering the case for which the power to tax was exercised.

**Distinction between tax and local assessment**.—See *Hill v. Higdon*, 5 O. S. 243; *Reeves v. Treas. Wood Co.*, 8 O. S. 333; *Sessions v. Crunkilton*, 20 O. S. 349; *Ridenour v. Saffin*, 1 H. 464.

**Distinction between tax and license fee**, see *Mays v. Cincinnati*, 1 O. S. 268; *Baker v. Cincinnati*, 11 O. S. 534; *Marmet v. State*, 45 O. S. 63; *Cincinnati v. Bryson*, 15 O. 625.

**Sec. 33.** [Maximum of municipal taxes allowable in municipalities.]<sup>1</sup> The aggregate of all taxes levied by any municipal corporation, exclusive of the levy for county and state purposes, for schools and schoolhouse purposes, for free public libraries and library buildings, for university and observatory purposes, for hospitals, and for sinking fund and interest, on each dollar of valuation of taxable property in the corporation on the tax list, shall not exceed in any one year ten mills.<sup>2</sup>

(1) **Old sections**.—See old §§ 2682, 2683, 2689, 2689a, 2689a(2), 2689b, (2689-1) R. S., all repealed.

(2) **What taxes included in aggregate amount allowed**.—Under the provisions of old § 2684 R. S., the limitation as to amount of taxes did not include special assessments. In the above § 33 of the Code, special assessments are not expressly excluded, though on general principles, assessments, not being strictly a tax, would not be included in the amount of taxes

allowable. See *Hunter v. Austin*, 9 C. C. 583.

Taxes raised on the general levy for street improvement were formerly held to be included in the total. *State ex rel. v. Strader*, 25 O. S. 527, but taxes levied to pay bonds issued for the corporation's part of a street improvement are now specially excepted by § 53 of the Code.

Whether taxes in excess of the amount here authorized could be levied to pay the debts of a municipal corporation in the absence of

any provision in the statute to that effect, see *U. S. v. Kent*, 12 O. F. D. 422.

Taxes levied by the City of Cincinnati to pay interest on Southern Railway bonds were held to be included in the aggregate amount allowed by statutes then in force. *State v. Humphreys*, 25 O. S. 520.

Under former statutes taxes levied on territory of a village annexed to a city, to pay bonds of the village for improvements, were held to be included in the aggregate amount allowed the village. *Cleveland v. Heisley*, 41 O. S. 670. And this was so even though the law requiring general levy for certain parts of street improvement (street intersections) referred to improvement already ordered. *Toledo v. Toledo*, 22 B. 131.

But where a statute authorizes a tax for a special purpose, this may

be in addition to the limit fixed by the general statute. *Hunter v. Austin*, 9 C. C. 533. And see *Walsh v. Sisler*, 20 C. C. 264.

**Effect of ordinance levying excess.**—An ordinance levying a tax in excess of the statutory limit or after the limit has been exceeded is wholly void. *Cummings v. Fitch*, 40 O. S. 56; but ordinance levying an additional tax after limit is reached, though void, does not affect an ordinance for tax before limit reached. *Cummings v. Fitch*, 40 O. S. 56; but an ordinance levying an amount in excess of the limit is not good up to the statutory limit, but is void both as to the amount beyond the limit and the amount within the limit. *Cleveland v. Heisley*, 41 O. S. 670.

As to duty of county auditor and council where municipal tax levy exceeds limit, see § 40 of the Code.

**Sec. 34.** [When greater tax may be levied; submission of question to vote.]<sup>1</sup> A greater tax than that authorized herein may be levied by the council of any municipal corporation for any purpose for which such corporation is authorized to levy taxes, if the proposition to make such additional levy shall be first submitted to a vote of the electors of the corporation under an ordinance prescribing the time, place and manner of voting on the same, and approved by two-thirds of those voting on the proposition.<sup>2</sup>

(1) **Old Section 2687**, R. S. repealed.

(2) Section 2687 cited, *Findlay*

*Gas Light Company v. Findlay*, 2 C. C. 237; *Dunham v. Opes*, 3 C. C. 274.

**Sec. 35.** [Heads of departments to report estimates to mayor and auditor or clerk.]<sup>1</sup> On or before the first Monday in March of each year the several officers, boards and departments in every municipal corporation, shall report an estimate, in itemized



form, to the mayor and auditor or clerk of the corporation, stating the amount of money needed for their respective wants for the incoming year and for each month thereof.<sup>2</sup>

(1) **Old sections.**—See old § 2690i R. S., repealed; and see § 37 *infra*.

(2) **Provision mandatory.**—Provisions such as these requiring estimates by officers and boards before appropriations are made, are mandatory and expenditure of the city funds without such previous estimate may be enjoined. *Ampt v. Cincinnati*, 5 N. P. 98.

The provisions of § 2690a to 2690q, requiring estimates, were held mandatory, so far as any municipal expenditure is concerned, in *Stem v. Cincinnati*, 6 N. P. 15. But whether failure to observe them would affect the validity of a tax levy, query in *Stem v. Cincinnati*, 6 N. P. 15.

#### ORDER OF PROCEDURE IN MUNICIPAL TAX LEVIES AND APPROPRIATIONS.

The fiscal year in each municipality begins January first and ends December thirty-first. (§ 42 of the Code.) The various steps to be taken by municipal officers can be clearly understood only by bearing this fact in mind. The order of procedure in municipal tax levies and appropriations is as follows:

##### THE TAX LEVY.

1. *Estimates for succeeding fiscal year*, to be furnished to the mayor and auditor or clerk by the heads of the various departments, on or before the *first Monday in March*, stating the amount of money needed for their respective wants for the next fiscal year, beginning January first, and for each month thereof. (§ 35 of the Code.)

NOTE.—The language used in the section is “the incoming year,” but since these estimates are the basis for the budget and tax levy designed to furnish money for the next fiscal year, the “incoming year” referred to in the section must be the next fiscal year.

2. *Estimates for year beginning April first*, to be furnished to the mayor and auditor or clerk by the heads of the various departments, on or before the *last Monday in March*, stating the amount of money needed for their respective wants for each month. (§ 37 of the Code.)

NOTE.—This section does not appear in the bill as passed by the senate, but was inserted to accomplish the same purpose, apparently, as § 35 above, and would do so but for the inconsistency in requiring the estimates to be made for a year beginning April 1, instead of for the succeeding fiscal year beginning January 1. There is no necessary conflict, however, in furnishing the estimates required both by § 35 and § 37, and the latter would serve the special purpose of affording comparison between immediate and anticipated needs as well as the source and amount of balances or deficiencies which may be expected in the several funds at the close of the current fiscal year.

3. *Auditor's or Clerk's Statement*, furnished the mayor and council and each member thereof, on or before the *first Monday in April*, showing (1) balances at end of last fiscal year, (2) monthly expenditures out of each fund and out of all funds for the preceding fiscal year, (3) annual expenditures from each fund for each of the last five fiscal years, and (4) monthly average of expenditures from each fund for the preceding fiscal year and total monthly average from all funds for the five preceding fiscal years. (§ 36 of the Code.)

4. *The Annual Budget*, submitted to council by the mayor on the *first day of April*, based upon the annual estimates furnished him by the departments. The items of any of these the mayor may revise and change, but he may not increase the total of any such estimate. The budget should show the needs of the several municipal departments for the succeeding fiscal year, and may conveniently be in the form of a message from the mayor, submitting to council a proposed ordinance for the annual tax levy. (§ 38 of the Code.)

5. *Tax Levy Ordinance*, passed by council, after examining and revising the budget. It should fix the percentage or rate of taxes to be levied for the several municipal purposes allowed by law. (§ 39 of the Code.)

6. *Submission to Tax Commissioners* of tax levy ordinance. (§§ 39 and 49 of the Code.)

7. *Submission to Mayor* for approval. The ordinance as approved by the Tax Commission, or as passed over its rejection by council, should be submitted to the mayor for approval. If the mayor disapproves the ordinance it may be passed over his veto by a two-thirds vote of council. (§ 125 of the Code.)

8. *Publication of Ordinance* in the manner required by § 124 of the Code and the statutes therein referred to.

9. *Certification to County Auditor* on or before the first Monday in July, the rate of taxes levied by the municipality. (§ 40 of the Code.)

#### THE SEMI-ANNUAL APPROPRIATIONS.

1. *Appropriating Ordinance for first six months* of fiscal year must be passed at the beginning of the year, making detailed appropriations of the moneys in the treasury (or estimated to come in during the six months) for each of the several objects for which the municipality has to provide, and dividing the same among all the various funds for said six months. Council may also in this ordinance set apart such sum as it may deem proper as a "contingent fund" to provide for deficiencies in any of the regular funds which may, by any unforeseen emergency, occur during the six months. The ordinance should be published, as one of a general nature. (§§ 43, 122 and 124 of the Code.)

2. *Appropriating ordinance for second six months* of fiscal year, must be passed at the beginning of the second half of said year, and the same formalities observed as above.

**Sec. 36.** [Statements to be furnished by city auditor and village clerk.]<sup>1</sup> On or before the first Monday in April of each

year the auditor of every city and clerk of every village shall furnish to the mayor and council and to each member thereof, the following statements, which council may require to be printed:<sup>2</sup>

1. A statement showing the balance standing to the credit or debit of the several funds on the balance sheet of the corporation at the end of the last fiscal year immediately preceding said first Monday of April.

2. A statement showing the monthly expenditures out of each fund in the twelve months, and the monthly expenditures out of all the funds in the twelve months of the fiscal year immediately preceding said first Monday of April.

3. A statement showing the annual expenditures from each fund for each year for the five fiscal years immediately preceding said date.

4. A statement showing the monthly average of such expenditures from each of the several funds for the preceding fiscal year, and also the total monthly average from all of them for the five preceding fiscal years.<sup>3</sup>

(1) **Old section.**—See § 2690f. R. S., repealed.

(2) The requirements of § 124 of the Code should not be construed as making it compulsory upon municipal authorities to publish the state-

ments mentioned in this section. But council may require them to be published as well as printed. Opinion of Attorney-General on file in his office, dated Dec. 3, 1902.

(3) See notes to § 35, *supra*.

**Sec. 37. [Reports to mayor and council; heads of departments to report estimates to mayor and auditor.]** The directors and officers provided for in this act shall upon request forthwith furnish to the mayor or council any information desired in relation to the affairs of their respective offices. To enable the mayor to make up his annual budget, it shall be the duty of each director or board and of each officer provided for in this act, on or before the last Monday in March of each year, to make and



file with said mayor, and also with the auditor, a carefully prepared and itemized estimate of the amount of money needed in such department or office for all purposes for the ensuing year, beginning on the first day of the next April,<sup>1</sup> said estimate to be given for each month.

(1) See notes and order of procedure under § 35 *supra*.

**Sec. 38. [Mayor's report to council; annual budget; how made up, etc.]<sup>1</sup>** The mayor shall communicate to council from time to time, a statement of the finances of the municipality and such other information relating thereto and to the general condition of the affairs of the municipality as he may deem proper or as may be required by council. He shall on the first day of April of each year submit to council the annual budget<sup>2</sup> of current expenses of the municipality, any item of which may be reduced or omitted by council, but council shall not increase the total of said budget. In the making of such annual budget, the mayor shall have power to revise and change any and all items in the annual estimates furnished to him by the directors and officers of the municipality as prescribed in this act, but said mayor shall not have power to increase the total of any such estimate when including the same in his annual budget to council. He shall on said date, and at such other times as he may deem expedient, report to council concerning the affairs of the corporation, and make such recommendations to council as he may deem proper for the welfare of the municipality.

**[Board of examiners; appointment, qualifications, duties, etc.]** He may at any time appoint competent, disinterested persons, not exceeding three in number, not more than two of whom shall be of the same political party, to examine without notice the affairs of any department, director, officer or employe in the city government, for the purpose of ascertaining facts; in connection with such examination, the mayor or such appointees shall have

full power to compel the attendance and testimony of witnesses, to administer oaths and to examine such persons as they shall deem necessary, and to compel the production of books and papers; and the result of such examination shall be recorded in the office of said mayor and shall also be transmitted by him to the council without delay and the council shall give to said examiners reasonable compensation for such services.

(1) **Old sections.**—See old § 2690i R. S. repealed, and see § 1750 R. S. not repealed. (2) See notes and order of procedure under § 35 *supra*.

**Sec. 39. [Duty of council as to examination, etc., of annual budget; duty of board of tax commissioners.]**<sup>1</sup> The council shall examine and revise the annual budget submitted by the mayor as provided in the next preceding section of this act, and after it shall have determined by ordinance the percentage to be levied for the several purposes allowed by law upon the real and personal property in the corporation returned on the grand duplicate the same shall be submitted by the council to the board of tax commissioners hereinafter provided, which board of tax commissioners shall examine and return same to the council within ten days, as provided by law, together with such suggestions and recommendations as it may deem proper.<sup>2</sup>

(1) **Old sections.**—Compare §§ 2690g, 2690c, R. S., special acts, repealed.

(2) **Changes in levy by commissioners.**—Under the former special act (2690g R. S.) the tax commissioners could exercise a veto power over the levy by council.

*Ampt v. Cincinnati*, 21 B. 216 and could reject any or all the levy, but could not increase it or modify it. *Ampt v. Cincinnati*, 4 C. C. 253.

See § 49 of the Code; and notes and order of procedure under § 35, *supra*.

**Sec. 40. [Percentage of tax to be certified to county auditor; his duty thereupon.]**<sup>1</sup> Council shall cause to be certified to the auditor of the county, on or before the first Monday in July,<sup>2</sup> annually, the rate of taxes levied by it on the real and personal

property in the corporation returned on the grand duplicate, who shall place the same on the tax list of the county in the same manner as township taxes are by law placed thereon,<sup>3</sup> the ordinance prescribing the levy shall specify distinctly each and every purpose for which the levy is made and the per cent. thereof, and the county auditor if he finds that the tax levy certified to him by the council of any city or village exceeds the aggregate limit allowed by law, shall have no authority to place the same on the tax list and the levy for such municipal corporation shall not be valid or collectible against any real or personal property in the corporation. If such tax levy is in excess of the limit allowed by law then the auditor shall immediately notify the council making such levy and council shall within ten days after the receipt of such notification revise its levy so as to bring it within the law.

- (1) **Old section.**—See old § 2691 R. S., repealed.

(2) **Provision directory.**—The requirement of certification at or before the time fixed in the statute
- was held to be directory in *Gates v. Beckwith*, 2 W. L. M., 589.

(3) **Annexed territory.**—Levy of tax on annexed territory after annexation. See *State v. Craig*, 21 C. C. 13.

FORM OF ORDINANCE LEVYING TAXES FOR MUNICIPAL PURPOSES.

Ordinance No.....

To Levy Taxes for Municipal Purposes for the Year 19....  
Be it ordained by the council of the city [*or village*] of.....  
State of Ohio:

Sec. 1. That there be levied and collected for municipal purposes for the year 19... on each dollar of valuation of the real and personal property within the city [*or village*] of....., returned on the grand duplicate and subject to taxation.....mills (not exceeding ten mills).

Sec. 2. That the levy above authorized for municipal purposes be and the same is hereby apportioned as follows:

|                         | MILLS |
|-------------------------|-------|
| General purposes .....  | _____ |
| Police Department ..... | _____ |
| Fire Department .....   | _____ |



|                                      |       |
|--------------------------------------|-------|
| Health Department .....              | _____ |
| Parks .....                          | _____ |
| Street Improvements and repairs..... | _____ |
| Lighting the corporation .....       | _____ |
| Etc., Etc.                           |       |

(These items may be further extended to embrace all objects not desired to be included under "general purposes.")

|                                      |       |
|--------------------------------------|-------|
| Total (not exceeding 10 mills) ..... | _____ |
|--------------------------------------|-------|

Sec. 3. That there be levied and collected on each dollar of the property aforesaid for the year 19... the following additional sums:

|                                                  |       |
|--------------------------------------------------|-------|
|                                                  | MILLS |
| For schools and school houses.....               | _____ |
| Free public libraries and library buildings..... | _____ |
| University and observatory.....                  | _____ |
| Hospitals .....                                  | _____ |
| Sinking fund and interest.....                   | _____ |
| Total.....                                       | _____ |
| Grand Total.....                                 | _____ |

(The additional levies are for those purposes not included within the ten-mill limit of § 33 of the Code. They may be used where applicable, and itemized to suit the requirements of the municipality.)

Sec. 4. That the clerk is hereby directed to certify the above levies to the auditor of.....county, to be placed on the tax list and collected according to law.

Sec. 5. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed....., 19.....

Attest:

|        |                       |
|--------|-----------------------|
| .....  | .....                 |
| Clerk, | President of Council. |

Sec. 41. [Corporation taxes; how collected; duty of corporation treasurer.]<sup>1</sup> The taxes of the corporation shall be collected by the county treasurer and paid into the treasury of the corporation in the same manner and under the same laws, rules and regulations as are or may be prescribed for the collection and paying over of state and county taxes; and the corporation treasurer shall keep a separate account with each fund for which taxes are assessed, which account shall be at all times open to public inspection. Unless expressly otherwise provided by law, all money collected or received on behalf of the corporation shall be promptly deposited in the corporation treasury in the appropriate fund, and the treasurer shall thereupon give notice of

such deposit to the auditor or clerk; and unless otherwise provided by law no money shall be drawn from the treasury except upon the warrant of the auditor pursuant to an appropriation by council.<sup>2</sup>

(1) **Old sections.**— See old §§ 2690, 2692 R. S., repealed.

(2) **In villages** there are no auditors, but the clerk of the village is the proper person upon whose warrant money is to be drawn from the treasury. See § 201 of the Code.

**Collection where no mode pro-**

**vided.**— If no special mode of collecting a tax is provided, where power is given to collect, council would have authority to prescribe the mode by ordinance. *Cincinnati v. Gwynne*, 10 O. 192; *Cincinnati v. Bank*, 14 O. 605.

**Sec. 42. [Fiscal year.]**<sup>1</sup> In all municipal corporations the fiscal year of each office, board and department shall terminate on the thirty-first day of December, in each year, and all accounts shall be closed on that day, and all annual reports required by law shall be made for the year terminating on that day.<sup>2</sup>

(1) **Old section.**— Compare old § 1545 R. S., repealed.

(2) **The fiscal year** under the new Code expires with the 31st day of December and the annual statements required in various sections of the Code to be made, include tran-

sactions up to and including the 31st day of December of each year. Opinion of attorney-general on file in his office, dated Dec. 3, 1902. See "order of procedure" under § 35, *supra*.

**Sec. 43. [Council to make appropriations at beginning of each fiscal half year; unexpended appropriations or balances shall revert to fund from which taken; transfer of funds; contingent fund.]**<sup>1</sup> In all municipal corporations council shall make, at the beginning of each fiscal half year, appropriations<sup>2</sup> for each of the several objects for which the corporation has to provide,<sup>3</sup> out of the moneys known to be in the treasury, or estimated to come into it during the six months next ensuing from the collection of taxes and all other sources of revenue. All expenditures within the following six months shall be made with and within

said appropriations and balances thereof. All unexpended appropriations or balances of appropriations remaining over at the end of the year and all balances remaining over at any time after a fixed charge shall have been terminated by reason of the object of the appropriation having been satisfied or abandoned, shall revert to the funds from which they were taken and they shall then be subject to such other authorized uses as council may determine; provided, that councils of cities or villages may at any time, by the votes of three-fourths of all the members elected thereto, and the approval of the mayor,<sup>4</sup> transfer all or a portion of one fund or a balance remaining therein, to the credit of one or more funds, but there shall be no such transfer except among funds raised by taxation upon all the real and personal property in the corporation, and no such transfer shall be made until the object of the fund from which the transfer is to be effected has been accomplished or abandoned.<sup>5</sup> In making the semi-annual appropriations and apportionments herein required council shall have authority to deduct and set apart out of any moneys not otherwise appropriated such sums as it shall deem proper as a contingent fund to provide for any deficiency in any of the detailed appropriations so to be made, which deficiency may lawfully and by any unforeseen emergency<sup>6</sup> happen, and such contingent fund or any part thereof may be expended for any such emergency only by an ordinance passed by two-thirds of all the members elected to council and approved by the mayor, and any balance remaining in such contingent fund at the end of the fiscal year shall thereupon become a part of the general fund to be again appropriated as other moneys belonging to the corporation; provided, that the provisions of this section shall in no way interfere with the provisions of an act entitled "An act to further provide for the transfer of public funds," passed May 6, 1902. (95 O. L., 371.)



(1) **Old sections.**—Compare old § 2690*h* R. S., a special act, repealed.

(2) **Detailed and specific appropriations.**—*Former statutes* for certain cities required the appropriations to be “detailed and specific.” Under such provisions it was held that the expenditures must be classified and appropriation in a lump sum would not be compliance with the statute. *Ampt v. Cincinnati*, 5 N. P. 98.

Former section 1693 R. S. also required that every ordinance appropriating money should contain an explicit statement of the uses and purposes for which the appropriation was made. (See *Stem v. Cincinnati*, 6 N. P. 15, 19; *Knauss v. Columbus*, 13 Dec. 200.)

*The present section* omits the words “detailed and specific,” and section 122 of the Code, which supersedes § 1693 R. S., also omits the requirement of an explicit statement in appropriating ordinances, but that such ordinances should specifically state the several purposes for which money is appropriated is shown by the requirement as to contingent fund ordinances in § 43 above, that they are to supply deficiencies in any of the “detailed appropriations so to be made.”

(3) **Purposes of appropriation.**—Entertainment of public guests is not a legal object for the appropriation by a city of its funds raised by taxation. *Stem v. Cincinnati*, 6 N. P. 15; *Moore v. Hoffman*, 2 C. S. C. R. 453.

(4) **Passing over mayor's veto.**—Under former statute 2690*h* R.

S. an appropriation from the contingent fund, not approved by the mayor, could be passed over his veto; but under the present section the mayor's approval would be essential, and passing an appropriation over his veto would not be an equivalent. See *State v. Brown*, 8 C. C. 103.

(5) **Transfer of funds.**—Transfer from one department to another department of the same fund was held to be forbidden under former statutes. *Stem v. Cincinnati*, 6 N. P. 15.

(6) **Unforeseen emergency.**—A contemplated improvement deferred for want of funds is not an unforeseen emergency within a provision such as this. *Ampt v. Cincinnati*, 1 N. P. 379.

To make a case within the meaning of a provision such as this, something unforeseen shall happen affecting the object for which the specific appropriation is made and which, by requiring an unexpected expenditure of money appropriated to that particular object, has caused or will cause a deficiency in the appropriation. *Ampt v. Cincinnati*, 1 N. P. 379. Whether the determination of council in the ordinance that an emergency did exist is final, see *Ampt v. Cincinnati*, 1 N. P. 379, 382.

Increase in legitimate municipal expenditures required by reason of a Grand Army encampment, which event was not decided upon until after the estimates for the year were made up, was held to be payable out of the contingent fund. *Stem v. Cincinnati*, 6 N. P. 15.

**“An act to further provide for the transfer of public funds.”**

[Sec. 1.] [Transfer of public funds.] That the county commissioners of any county, infirmiry directors of any county or municipality, the township trustees of any township, the board of education of any school district, the council or other board or body having the legislative power of any municipality and the trustees of any hamlet, shall have power to transfer the public funds under their respective supervision, from one fund to another, in the manner hereinafter provided, which shall be an additional procedure to all other now provided by law.

[Sec. 2.] [Petition to be filed in Common Pleas Court; notice of filing, etc.; hearing and decree of court; costs; appeal.] Whenever a majority of officers or of the members of any board aforesaid named desire to transfer any fund to any other fund, or to a new fund to be created, under their respective supervision, and a resolution of such officers or board shall have been duly passed declaring the necessity therefor, such officers or board shall file a petition in the Court of Common Pleas of the county in which such funds are held, in which shall be set forth the name and amount of the fund, and the fund or funds to which it is desired to be transferred, a copy of said resolution and a full statement of the proceedings pertaining to its passage, and the reason or necessity for such transfer, and upon such petition being filed, the petitioner shall cause notice of the filing of said petition, the objects and prayer thereof, and of the time when said petition will be for hearing, to be given by one publication in two newspapers, of opposite politics, having a general circulation in the territory to be effected by such transfer of funds, preference to be given to such newspapers as are published within such territory, but if there shall be no such newspapers published or having a general circulation within such territory, then such notice shall be given by posting the same in ten of the most conspicuous places within such territory for such period of four weeks: said petition may be heard at the time stated in said notice, or as soon thereafter as it shall be convenient for the court to hear the same, but said cause shall be heard, upon request of the petitioners, in preference to all other cases on the docket. Any person or persons objecting to the prayer of such petition, shall file their objections in said cause on or before such time fixed in said notice for hearing, and they shall be entitled to be heard. If, upon the hearing, the court shall find that the notice has been given, as herein required, that the petition states sufficient facts, and that there are good reasons, or that a necessity exists for

such transfer, and no injury will result by granting the prayer of such petition, it shall grant the prayer of the petition and order the petitioners to make such transfer, and a copy of the findings, orders and judgments of the court shall be certified by the clerk and spread upon the records of the officers or board who are petitioners, and upon the same being done such petitioners may make the transfer of funds as directed therein. And such petitioners shall pay all of the costs of such proceedings, except when objections are filed, the court may order such persons objecting to pay all or such portion thereof as may be just and equitable. Said petitioners or any person or any number of persons filing objections to such petition, may appeal said cause to the Circuit Court of said county, and the proceedings for such appeal shall be the same as provided for appeals from the Common Pleas to the Circuit Court in other cases, and when said cause shall be appealed, the Circuit Court shall have the same power and make the same orders and all proceedings therein shall be had, as herein provided for in the Court of Common Pleas, except upon such appeal, the question of costs shall be within the discretion of said court; and such cause may be reviewed on error in the Supreme Court. [95 v. 371.]

**Sec. 43a. [Unexpended balances.]** Any unexpended balance remaining in a fund which was created by an issue of bonds the whole or any part of which issue is still outstanding unpaid and unprovided for, shall, when such balance is no longer needed for the purpose for which said fund was created, be transferred to the trustees of the sinking fund to be applied in the payment of the bonds. All acts or parts of acts inconsistent with this provision be and the same are hereby repealed in so far as such inconsistency exists. [1904, April 27, 97 v. 520.]

**Sec. 44. [Monthly statement of balances in all funds and accounts.]<sup>1</sup>** The auditor or clerk, and the treasurer in all municipal corporations shall make up monthly, a statement of the balances in all funds and accounts in their offices, as the same exist at the close of business on the last day in the month, and such officers shall forthwith compare such statements, correct any errors in them, and at once forward a copy of the same to the mayor, who shall keep them for public inspection.<sup>2</sup>



(1) **Old Section.**— Compare old § 1765a R. S. repealed.

(2) Section 124 of the Code should not be construed as making it compulsory on city authorities to pub-

lish the statements mentioned in this section. Opinion of attorney-general on file in his office, dated Dec. 3, 1902.

**Sec. 45. [Restrictions as to contracts, appropriations and expenditures; proviso.]**<sup>1</sup> No contract, agreement or other obligation involving the expenditure of money shall be entered into, nor shall any ordinance, resolution or order for the expenditure of money, be passed by the council or by any board or officer of a municipal corporation, unless the auditor of the corporation, and if there is no auditor, the clerk thereof, shall first certify to council that the money required for the contract, agreement or other obligation, or to pay the appropriation or expenditure, is in the treasury to the credit of the fund from which it is to be drawn, and not appropriated for any other purpose, which certificate shall be filed and immediately recorded;<sup>2</sup> and the sum so certified shall not thereafter be considered unappropriated until the corporation is discharged from the contract, agreement or obligation, or so long as the ordinance, resolution or order is in force; and all contracts, agreements or other obligations, and all ordinances, resolutions and orders entered into or passed, contrary to the provisions of this section shall be void, and no party whatever shall have any claim or demand against the corporation thereunder; nor shall the council, or a board, officer, or commissioner of any municipal corporation, have any power to waive or qualify the limits fixed by such ordinance, resolution or order, or fasten upon the corporation any liability whatever for any excess of such limits, or release any party from an exact compliance with his contract under such ordinance, resolution or order; nor shall any member of the council, board, officer or commissioner of the corporation, have any interest in the expenditure of money on the part of the corporation other than his fixed compensation;<sup>3</sup> and a violation of any provision of this section shall disqualify the party violating it from holding any office of

trust or profit in the corporation, and render him liable to the corporation for all sums of money or other thing he may receive contrary to the provisions of this section, and if in office he shall be dismissed therefrom; provided, however, that the council of any city may authorize and the council of any village may make (subject to the provisions of sections 2491 and 3551 of the Revised Statutes of Ohio)<sup>4</sup> a contract with any person, firm or company for lighting the streets, alleys, lands, lanes, squares and public places in the municipal corporation, or for furnishing water to such corporation, or for the collection and disposal of garbage in said corporation, or for the leasing of the electric light plant and equipment, or the waterworks plant, or both, of any person, firm or company therein situated, for a period not exceeding ten years, and the requirement of a certificate that the necessary money is in the treasury shall not apply to such contract; provided further, that such requirement shall not apply to street improvement contracts extending for one year or more, nor to contracts made by the board of health of any municipality, nor to contracts made by any village for the employment of legal counsel.

(1) **Old sections.**—These restrictions substantially incorporate old sections 2699 and 2702 R. S., repealed; the former applying to Cincinnati only, and known as the "Worthington Law," the latter applying, with certain exceptions, to all municipalities and known as the "Burns Law."

General exceptions to the requirement that money for a municipal contract be in the treasury were formerly contained in old §§ 2264 R. S.; 2273 R. S.; 2275 R. S. and 3471-4 and 3471-4a R. S., all of which are repealed by the Code.

(2) **Must be funds at time of ordinance.**—The money must be in the treasury and so certified at the time the ordinance is passed, before the ordinance can take effect. That

the money has since come into the treasury and has been set apart is not sufficient. *State v. Hoffman*, 25 O. S. 328.

The fact that funds are actually in the treasury, does not dispense with certificate. *State v. Bair*, 50 B. 11; *Findlay v. Pendleton*, 62 O. S. 80.

As to the exact time when the certificate is required in case of several steps in a proceeding ending in the expenditure of money, see *Braman v. Elyria*, 26 C. C. 731; 5 C. C. (N. S.) 387 (aff'd 73 O. S. 346); *Pullen v. Smith*, 26 C. C. 549; 5 C. C. (N. S.) 1; *Ryan v. Hoffman*, 26 O. S. 109; *Tyler v. Columbus*, 6 C. C. 224.

**To what expenditures applicable**—*Generally.*—These restrictions were held, under former statutes, not to apply to contracts payable out of a fund not raised by taxation. *Kerr v. Bellefontaine*, 59 O. S. 446, 464; *Comstock v. Nelson-*

ville, 61 O. S. 288, 294; *State ex rel*, v. Gibson, 1 N. P. (N. S.) 565 (aff'd, 49 B. 87).

Thus the former sections were held not to apply to purchases by gas trustees for the erection of gas works, for they were not payable out of a fund raised by taxation. *Kerr v. Bellefontaine*, 59 O. S. 446, 464.

The power of the various boards of a city to make contracts is limited by such a provision. Thus a contract by waterworks board under § 2415 is so restricted, *Newton v. Toledo*, 18 C. C. 756.

Resolution of council accepting a gift of a public library and agreeing to maintain the same at an expense of one thousand dollars per year, is not within the inhibition of this section. *Smith v. Evans*, 74 O. S. —. But see *Pullen v. Smith*, 26 C. C. 549; 5 C. C. (N. S.) 1.

**Employment contracts.**—Employment of a street superintendent at a weekly salary is not authorized unless at the time of employment money to pay for such employment was in the treasury and so certified. *State ex rel*, v. Hoffman, 25 O. S. 328.

So employment of a superintendent over the construction of a town hall. *Drott v. Riverside*, 4 C. C. 312.

Employment of an attorney for Sunday law prosecutions, without certificate of money in treasury, was held void. That the amount of payment in such case could not be ascertained in advance was held to make no exception, for a maximum could have been fixed; nor was it material that the services were to preserve order and enforce an ordinance. *Bond v. Madisonville*, 2 C. C. 449.

Employment of attorney by a board, without certificate of auditor that money is in treasury to pay for services, is void, though the board was empowered to sue and be sued. Though the money was in treasury and a financial statement was made to council at each meeting, the certificate could not be dispensed with. *Findlay v. Pendleton*, 62 O. S. 80.

Expenses incurred in employing a village solicitor were held to be within the restriction of such a provision, where there was no proviso excepting such employment.

*Easton v. Hyde Park*, 6 N. P. 257. Under the present Code, however, the employment of counsel by villages is specially excepted from the restrictions.

**Condemnations.**—Ordinances to appropriate property for public purposes, as for a public park, are valid without the certificate of money in the treasury to pay for the appropriation. This is put on the ground that the ordinance to appropriate is not one to expend money, the amount is not ascertainable and bonds are issued to pay the award. *Put-in-Bay v. Webb*, 18 C. C. 780. But see *Ryan v. Hoffman*, 26 O. S. 109, 123.

So condemnation of property for opening a street is not within such provisions. *Klopfner v. Sunderland*, 1 Dayton 143; see also *Tyler v. Columbus*, 6 C. C. 224; but see *Rhoades v. Toledo*, 6 C. C. 9, *contra*.

**Contracts for street improvements.**—The restriction requiring certificate of auditor of money in the treasury does not apply to contracts for street improvements when bonds have been authorized by the municipality to be issued to pay the entire estimated cost and expense of the improvement. *Emmert v. Elyria*, 74 O. S. — (51 B. 189).

Nor is the certificate required for so much of the cost as is to be paid for by assessments on abutting property. *Comstock v. Nelsonville*, 61 O. S. 288. And this is true, even though some of the assessments may prove uncollectible by reason of deficient value of lots or otherwise. *Ib*.

For construction of provisions of former statutes, see *Wood v. Pleasant Ridge*, 12 C. C. 177, 182; *Irwin v. Greenville*, 1 Dayton 140; *Chittenden v. Columbus*, 14 Dec. 333; 1 N. P. (N. S.) 420; *Cincinnati v. McErlane*, 3 B. 843; *Kirchner v. Cincinnati*, 14 B. 48; *Ryan v. Cincinnati*, 2 B. 251; *Mills v. Norwood*, 26 B. 348; *McGrew v. Elmwood Place*, 17 C. C. 676; *Comstock v. Nelsonville*, 61 O. S. 288. See also *Trowbridge v. Hudson*, 24 C. C. 76; 3 C. C. (N. S.) 644 (as to contracts relating to sidewalk improvements under former statutes).

Meaning of the provision excepting "street improvement contracts extending for one year or more," see *Emmert v. Elyria*, *supra*.



**Running expenses.**—The former statutes covering the subject matter of the present section were held to be restrictions on the power of a municipal corporation to contract, and to refer to all contracts made by a city. Thus the restrictions would apply to all contracts for lighting the streets of the city, where the words did not except such contract. *Ampt v. Cincinnati*, 2 N. P. 332, 339; *Cope v. Wellsville*, 25 B. 250.

The ordinary expenses of running the municipality were held to be included in such provisions and they were held not to be limited to improvement contracts. *Easton v. Hyde Park*, 6 N. P. 257; *State v. Philbrick*, 13 Dec. 158.

But see *Lima Gas Light Co. v. Lima*, 4 C. C. 22, 28, where it was held that the former sections applied only to a certain class of contracts, those affecting improvements made by the city, and had no application so far as contracts affecting expenses in running the city were concerned; and lighting contracts were therefore held not within the restrictions, even though not expressly excepted. See also *Cope v. Wellsville*, 25 B. 250.

**Exceptions implied by other statutes.**—Implied exceptions to the restrictions of such a section as this may be caused by the provisions of other statutes. Thus the provision requiring an armory to be furnished by a city (R. S. § 3085) was held to make the city liable for rent, though no certificate of money in the treasury had been made. *Wilson v. Cincinnati*, 19 B. 10; see also *State ex rel. v. Massillon*, 24 C. C. 249; 2 C. C. (N. S.) 167.

And the restrictions were held not applicable to a contract for a trunk sewer under a former trunk sewer act (84 O. L. 75), for otherwise the

law could not be carried out, since the act requires contracting at once and collection of fund by subsequent levy. *Cincinnati v. Honnigfort*, 32 B. 32. And see *Cincinnati v. Holmes*, 56 O. S. 104.

They were held not applicable in their entirety to a city's waterworks; for otherwise an accident to the machinery might leave the city helpless for months. *Cincinnati ex rel. v. Cincinnati*, 11 C. C. 309, 317.

Where gas trustees are given power to construct and control gas plants, things necessary to accomplish the purpose of carrying out the power, employing service necessary, preserving the property from destruction and impairment to a degree not amounting to rebuilding or extension, are incidental and go with the power expressly given to construct and control. Current expenses incurred in thus operating and controlling the property do not require certificates that money is in the treasury, for otherwise it would be almost impossible to operate the institution as required by the special statute giving the power. *Findlay v. Parker*, 17 C. C. 294, 300 (aff'd 63 O. S. 565).

The act (90 O. L. 34) authorizing certain cities to make dredging contracts was held to make an exception to the restrictions of § 2702 R. S. *Sprinkle v. Cleveland*, 12 C. D. 644.

*Express provisions in other statutes*, excepting contracts made under them, from the restrictions of a statute such as § 45, must be read as an exception to this section. *Mt. Vernon v. State*, 71 O. S. 428.

*Exceptions implied from necessity*, where public health endangered, see *Columbus v. Bohl*, 1 N. P. (N. S.) 469; 13 Dec. 569.

**Contracts running beyond year.**—Street improvement contracts extending for one year or more are made special exceptions by the Code.

A contract by which a city agrees to pay a water company hydrant rentals for water for fire purposes for thirty years would not be void on the ground that there was not a certificate of money in the treasury sufficient to satisfy the amount falling due for the full period of thirty years. *Defiance v. Council*, 23 C. C. 96 (reversed on other grounds, 68 O. S. 520). See also *Defiance Water Co. v. Defiance*, 12 O. F. D. 299 (reversed on other grounds, 14 O. F. D. 127).

As to contracts running over a year, under the former sections on this subject relating to Columbus (§§ 1545-150, 2699-1 R. S. repealed), see *Fergus v. Columbus*, 6 N. P. 82.

**Effect of ordinance or contract made without certificate.**—A contract without the certificate required imposes no liability on the municipality to pay. It is not estopped to set up the defense of the want of a certificate. *Lancaster v. Miller*, 58 O. S. 558.

The municipality is not liable though the contractor has fully performed his contract. He must ascertain at his peril whether the certificate has been filed and recorded or not. *Comstock v. Nelsonville*, 61 O. S. 288.

Where city employed superintendent over town hall construction, when the auditor had not certified that the required money to pay for such employment was in the treasury the city was held not liable to pay for his services, although they were valuable. *Drott v. Riverside*, 4 C. C. 312.

Under the former statutes, where the requirement was that the money should be "specially set apart" it was held that a contract before the money was set apart was invalid, even though the money was in the treasury at the time of the contract, though afterwards expended on other contracts. *Lowry v. Cincinnati*, 1 B. 102.

A provision such as contained in this section is designed only to restrain municipal extravagance. It does not make work, done without the preliminaries here required, illegal so as to impose a liability which would not otherwise have been imposed. *Elster v. Springfield*, 49 O. S. 82.

Thus, where a sewer is constructed by the city without money in the treasury for that purpose and the sewer does injury by carrying off percolating waters, which had fed a spring, the city is not liable. *Id.*

**Pleading and practice.**—It is sufficient if the petition avers that the contract was duly made. It is not necessary to aver that the certificate of money in the treasury was made. *Neubauer v. Bd. Education*, 6 N. P. 530.

That a city's partly executed contract is void because there had been no certificate of funds in the treasury, is not necessarily grounds for injunction to restrain further execution of it. *Ampt v. Cincinnati*, 34 B. 111, 112.

When the municipality refuses payment to a contractor on the ground that the fund provided by legislative authority has already been expended, the corporation must show clearly that at the time of making the contract and entering upon its execution it with others exceeded the amount the fund provided. Otherwise this defense can not prevail. *Cincinnati v. Cameron*, 33 O. S. 336.

(3) **Officer interested.**—Compare Sections 6969 R. S. and 6976 R. S., making it a crime for any person holding any office of trust or profit in this state, or any agent, servant or employee of any officer or of a board of officers to be interested in any contract for the purchase of property or supplies for the use of any county, township, school district, municipal corporation or public institution or any municipal officer to be interested in any contract or work with or for the corporation.

Under such sections it is held unnecessary to a conviction that the officer make a profit on the contract,

but sufficiently if he is personally interested in the proceeds of the sale; nor is it any defense that when said contract was made money therefor was not certified to be in the treasury. *Doll v. State*, 45 O. S. 445; and the contract so made is void. *Dalzell, etc., Co. v. Findlay*, 5 C. C. 435 (aff'd, 27 B. 128); *Bellaire Co. v. Findlay, et al.*, 5 C. C. 418; *Findlay v. Parker*, 17 C. C. 294 (aff'd, 63 O. S. 565); *Marsh v. Hartwell*, 2 N. P. 389. See also *State v. Funk*, 16 C. C. 155.

Compare also § 3974 R. S. forbidding any member of a school board to be interested in a contract with such board, under which it was held that a contract between the board and a firm in which a member of the board is a partner is void, and any taxpayer may enjoin the same. *Grant v. Brouse*, 1 N. P. 145.

As to punishment of persons giving bribes to officers or public agents, see § 6900 R. S. An accountant employed by a city board of revision held an officer within the meaning of § 6900. *Barker v. State*, 69 O. S. 68.

A contract of employment between a member of council and a railway company by which the member of council is to devote his time to the

general management of the company's business in that city including the procurement of the rights of way over the streets, which are to be granted by the council of which the councilman is a member, was held void. *Railroad Company v. Morris*, 10 C. C. 502.

In construing § 856 R. S., forbidding county commissioners to have an interest in a contract on behalf of the county, it was held that the penalty could not be enforced in a case where the contractor, subsequent to the letting of the contract, entered into an agreement to purchase material therefor from a corporation in which the commissioner was a stockholder, and such subsequent agreement had no influence in procuring the contract. *State ex rel. v. Pinney*, 47 B. 820.

Member of board of health is an officer of municipality, and ineligible to office of district physician during term or for one year thereafter. *State ex rel. v. Wichgar*, 27 C. C. 743.

As to validity of contracts made by public officials extending beyond the expiration of their terms, see *State ex rel. v. Lewis*, 12 Dec. 46.

(4) For these sections, see Part II.

**Sec. 45a. [When money may be deemed in treasury and in appropriate fund.]** Money to be derived from lawfully authorized bonds or notes sold and in process of delivery shall for the purpose set forth in section 45 of this act be deemed in the treasury and in the appropriate fund. [1904, March 21, 97 v. 44.]

**Sec. 45b. [Shall not adopt plans or specifications for public improvement which requires exclusive use of patented articles, etc.]** No municipal corporation shall adopt plans or specifications for any public improvement required by law to be made by contract let after competitive bidding which require the exclusive use of any patented article or process or any article or process protected by any trade-mark or any article or process wholly controlled by any person, firm or corporation or combination thereof. [1906, April 16, 98 v. 204.]



(b) *Tax Commission.*

**Sec. 46.** [Board of tax commissioners and board of sinking fund trustees; appointment, qualifications, term, etc.]<sup>1</sup> In each city there shall be a board of tax commissioners, which shall also constitute the board of sinking fund trustees, as provided in § 108 of this act, to consist of four citizens of such city who shall be electors of said city, well known for their intelligence and integrity, to be appointed by the mayor, one for four years, one for three years, one for two years, and one for one year, and their successors shall be appointed for four years from the expiration of their respective terms. Such appointments shall be so distributed that not more than two members of said board shall belong to the same political party. In case of any vacancy by death, resignation, removal from the city or otherwise, of either of such commissioners, the same shall be filled by appointment by the mayor for the unexpired portion of such term.

(1) **Old sections.**—Tax commissioners under special acts formerly existed in Cleveland (§1545-72 R. S.); Cincinnati where Board of Supervisors acted in such capacity (§ 2690m R. S.); Columbus (§

1545-149 R. S.); Dayton (§ 2690l R. S.); and in many other cities by virtue of Sections 2690a R. S. All these sections are repealed by the new Code.

**Sec. 47.** [No compensation.] The members of said board of tax commissioners shall not receive any compensation for their services.

**Sec. 48.** [Oath; organization; record of proceedings; clerk.] The members of said board of tax commissioners shall each take an oath to support the Constitution of the United States and of the State of Ohio, and to faithfully and honestly perform their duties as such tax commissioners. Said board shall organize by appointing one of its members president, another vice-president; a majority of the members thereof shall constitute a quorum for the transaction of business. The board shall keep

a full record of all its proceedings, and the city auditor shall be clerk of said board, and shall receive no additional salary or compensation for services as clerk of said board, and shall enter in a book to be provided by the city for that purpose a full and detailed statement of all its proceedings which shall be signed by the president or vice-president and said clerk.

**Sec. 49. [Powers and duties of board of tax commissioners.]<sup>1</sup>**

The board of tax commissioners, upon receipt of the levies made by the council as provided by law, shall consider the same, and within ten days after such receipt shall return the same to the council with its approval or rejection, in case of rejection giving its reasons therefor. It may approve or reject any part or parts thereof, and the parts rejected by said board shall not become valid levies unless the council of such municipality shall thereafter by a three-fourths vote of all members elected thereto adopt such levy or part thereof so rejected by said commission. If the board of tax commissioners approve said levies, or if it neglect to return the same with its approval or rejection within ten days as aforesaid, the same shall be valid and legal; provided, that in no case shall the board of tax commissioners have authority to increase said levy.

(1) Compare with old § 2690g R. S. repealed.

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FIFTH. ASSESSMENTS.

*(a) Assessments in General.*

**Sec. 50. [Assessments which may be made special; method of assessment.]<sup>1</sup>** The council of any municipal corporation may assess <sup>2</sup> upon the abutting, adjacent and contiguous or other specially benefited lots or lands <sup>3</sup> in the corporation, any part <sup>4</sup> of the entire cost of and expense <sup>5</sup> connected with the improvement of any street, alley, dock, wharf, pier, public road, or place by grading, draining, curbing, paving, repaving, repairing, constructing sidewalks, piers, wharves, docks, retaining walls, sewers, drains, water courses, water mains or laying of water

pipe and any part of the cost of lighting, sprinkling, sweeping, cleaning or planting shade trees upon the same<sup>6</sup> by either of the following methods:

First. By a percentage of the tax value of the property assessed.<sup>7</sup>

Second. In proportion to the benefits which may result from the improvement,<sup>8</sup> or

Third. By the foot frontage of the property bounding and abutting upon the improvement.<sup>9</sup> [1904, April 19, 97 v. 98.]

(1) **Old section** 2264 R. S. repealed and see old sections 2264a, 2264b, 2266, 2267, and 2269 R. S. repealed.

(2) **Nature of power of assessment.**—Assessments for street purposes are those special and local impositions upon property in the immediate vicinity of an improved street, which are necessary for the improvement and levied with reference to the special benefit which such property derives from the expenditure of the money. *Raymond v. Cleveland*, 42 O. S. 522.

A reassessment is a reapportionment of the cost and expense of such improvement and the imposition may be either upon the same lands or part of the same lands and it may include other lands. *Ib.*

The principle underlying special assessments is that the property upon which they are imposed is peculiarly benefited and therefore the owners do not in fact pay anything in excess of what they receive by reason of the improvement. *Walsh v. Barron*, 61 O. S. 15; *Donohue v. Brotherton*, 7 N. P. 367.

From the very nature of assessments, they cannot in any case exceed the benefits, for otherwise they would be a taking of private

property for public use without compensation in violation of § 19, Art. 1, of the Constitution of Ohio. *Chamberlain v. Cleveland*, 34 O. S. 551; *Railway Co. v. Cincinnati*, 62 O. S. 465; *Dayton v. Bauman*, 66 O. S. 379, and see notes to § 53 of the Code.

#### **Distinguished from taxation.**—

The power of assessment is not limited by the constitutional provision requiring taxation by a uniform rule. The power of assessment differs from the power of taxation. *Ridenour v. Saffin*, 1 H. 464; *Hill v. Higdon*, 5 O. S. 243; *Reeves v. Treas. Wood Co.*, 8 O. S. 333; *Sessions v. Crunkilton*, 20 O. S. 349.

Though in a general sense a tax is an assessment, and an assessment is a tax, there is a well recognized distinction between them. *Lima v. Cemetery Assn.*, 42 O. S. 128; and exemption from taxation would not exempt from assessment for local improvement. *Ib.*

Assessments in proportion to benefits are not a taking of private property for public use, but rather a species of taxation. *Scovill v. Cleveland*, 1 O. S. 126.

The fact that lands not included in a taxing district are more benefited than some lands in the dis-



trict was held not to render an assessment invalid. *Weston v. Commissioners*, 6 C. C. 641; see also *Raymond v. Cleveland*, 42 O. S. 522.

**Validity in general.**—Legislation authorizing municipalities to levy assessments for street improvements, upon property specially benefited, is constitutional. *Hill v. Higdon*, 5 O. S. 243; *Reeves v. Treas. Wood Co.*, 8 O. S. 333; *Sessions v. Crunkilton*, 20 O. S. 349. In *Dayton v. Bauman*, 66 O. S. 379, where power to assess abutting property to pay costs of condemnation was denied, the power to assess for surface improvements, was reaffirmed.

Such legislation is not unconstitutional even though it does not adequately restrict the power of assessment so as to prevent abuse. The duty imposed by § 6, Art. 13 of the Constitution is in this regard directory and not mandatory. *Parsons v. Columbus*, 50 O. S. 460. As to what would be sufficient restriction see, *Maloy v. Marietta*, 11 O. S. 636.

Assessments may be authorized to be made in proportion to the feet front or upon the value of the lands as assessed for taxation, leaving to the municipality the choice of mode. *Ernst v. Kunkle*, 5 O. S. 520; *Hill v. Higdon*, 5 O. S. 243; *R. R. Co. v. Connelly*, 10 O. S. 159, 163.

**Uniformity.**—The rule of apportionment in assessment, whether by the front foot or a percentage upon the assessed valuation must be uniform, affecting all property alike. One rule cannot be applied to one owner and a different one to another owner. *R. R. Co. v. Connelly*, 10 O. S. 159, 165; *Jaeger v. Burr*, 36 O. S. 164; *Upington v. Oviatt*, 24 O. S. 232, 246.

An assessment is not uniform which prescribes an equal proportionate charge, but allows a credit to the owners on one side, who had already done most of the work on that side. *Jaeger v. Burr*, 36 O. S. 164.

But the requirement of uniformity is not violated by dividing a street of varying widths, into as many sections as there are different widths and uniformly assessing the property on each section. *Findlay v. Frey*, 51 O. S. 390. If a street of varying widths, however, is not divided into sections, the assessment does not have to be graduated according to the width, but may be uniform on all the street. *Smith v. Cincinnati*, 6 N. P. 175. The same is true of assessment for sidewalks of varying widths. *Ulm v. Cincinnati*, 7 N. P. 278.

Where a street to be improved divides two municipalities, each may assess the abutting property within the limits and a difference in amount between the two assessments will not invalidate. *Scully v. Cincinnati*, 1 C. S. C. R., 183.

As to uniformity where property not abutting, but near to, the improvement, is included, see *Allen v. Cleveland*, 1 Clev. 2. Under a statute allowing assessment of property abutting on the street or "near thereto" the assessment need not be made upon property on the whole street, but only on that part of the street improved. *Scovill v. Cleveland*, 1 O. S. 126.

As to validity of assessment where property in the assessing district is divided into two classes, viz., abutting property, and contiguous property, and each class assessed by a different rule, see *Akron v. Allen*, 22 B. 260 (Supreme Court not reported).

**Change of law pending proceedings.**—The assessment must be governed by the law as it was at the time of the improvement ordinance, with respect to the manner of assessment and the rights and liabilities of the owners of abutting property. *Cincinnati v. Seasongood*, 46 O. S. 296; *Shehan v. Cincinnati*, 25 B. 212 (aff'd, 27 B. 375).

In *Toledo v. Marlow*, 28 C. C. 298; 8 C. C. (N. S.) 121, it was held that assessment is a proceeding within the meaning of and protected by § 79 R. S., and that the law in force at the commencement of the proceeding must govern, and the limit of assessment provided at that time prevails, and that in the absence of a petition for the improvement, the preliminary resolution is the beginning of the proceeding; see also *Squier v. Cincinnati*, 5 C. C. 400. But as to this ground see *Union Co. v. Greene*, 40 O. S. 318, disapproved, however, in 58 O. S. 225. See also *Ehni v. Columbus*, 3 C. C. 494; and *Crossley v. Findlay*, 10 C. C. 286.

But it was held that the board which has jurisdiction to pass the resolution to improve, has jurisdiction to complete the improvement, and a law changing the board, passed between the time of the resolution to improve, and the improvement ordinance does not discontinue the power of the board passing the resolution. *Cincinnati v. Davis*, 58 O. S. 225, 236.

And when an improvement is petitioned for, to ascertain the effect of the petition, reference should be had to the law in force at the time the petition was presented. *Hays v. Cincinnati*, 62 O. S. 116, 122.

The saving clause (§ 211) of the Code, provides that no rights in favor of or against any municipal corporation existing prior to the act, nor any action, prosecution or proceeding shall be affected by the change in the law. A section similar to this in a former Code (§

1539 R. S. repealed) was held to apply to assessments and make the rights of parties fixed under the law in force at time of improvement ordinance. *Raymond v. Cleveland*, 42 O. S. 522, 529; *Cincinnati v. Davis*, 58 O. S. 225. And the law in force at the time of the assessment would govern a reassessment, required by the former law to be conducted in the same manner as the original assessment, though the new law was passed before the reassessment. *Ib.* After a contract has been made for an improvement and the work commenced, the right to make an assessment to defray the expenses of the improvement, will not be affected by repeal of the act governing such matter, where there is a saving clause in the new law. *Corry v. Gaynor*, 22 O. S. 584; *Hubbard v. Norton*, 28 O. S. 116.

Independently of any saving clause, it was held that a new law, though limiting the amount of assessments, could not affect contracts made by a city with a contractor to deliver to him the assessments made, for such new law would in this regard impair the obligation of contracts. *Goodale v. Fennell*, 27 O. S. 426.

**Existing assessment ordinances remain in force** notwithstanding the change of the organization of a municipality, if not inconsistent with the statute. *Neff v. Bates*, 25 O. S. 169.

**Construction of assessment laws.**—Strict construction in favor of property owner is required. *Cincinnati v. Connor*, 55 O. S. 82, 91. See also § 2327 R. S., re-enacted under § 94 of the Code.

The general policy of assessment laws being to limit the amount of assessments, particular statutes

will be construed as though intended to adhere to that principle. *Birdseye v. Clyde*, 61 O. S. 27.

**Conditions precedent to assessment.**—The determination to make the improvement and to charge lot owners must precede the actual making of the improvement. *Donohue v. Brotherton*, 7 N. P. 367; *Folz v. Cincinnati*, 2 Handy 261. But the assessment may be made before the improvement. *Morgan v. Cleveland*, 1 Clev. 38.

The determination of council as to what part of the costs shall be assessed upon abutting property is a condition precedent to the power to assess. *Knorr v. Cincinnati*, 21 B. 297.

**Contesting assessments — Injunction.**—An assessment standing on the tax duplicate will be presumed to be valid, and one seeking to enjoin its collection must show its invalidity by proper averment and proof. *Bolton v. Cleveland*, 35 O. S. 319.

Perpetual injunction will be granted only when the plaintiff shows a clear right thereto. *Spangler v. Cleveland*, 43 O. S. 526.

Injunction will not lie by abutting owner prior to the making of the contract because of defects in the improvement. Owner can enjoin assessment when made. *Wood v. Pleasant Ridge*, 12 C. C. 177.

Where an assessment may be contested on a ground common to all abutting owners, as for defects in the proceedings and also on a ground peculiar to one owner alone, one who resorts to the former ground is barred, in a later suit, from contesting assessment on the latter ground. *Cincinnati v. Emerson*, 57 O. S. 132.

Petition to enjoin must show

that the plaintiff is prejudiced by the irregularities complained of. *Slavin v. Greene*, 2 N. P. 39. Amendment of petition, see *Ulm v. Cincinnati*, 7 N. P. 278.

Assessment will not be enjoined for irregularities in proceedings which are curable, where the amount properly chargeable is the same as the assessment. *Steese v. Oviatt*, 24 O. S. 248.

Injunction will lie where the contractor has failed to perform his contract. *Stone v. Viele*, 38 O. S. 314.

Where sufficient installments have been paid to equal a proper assessment court may enjoin collection of remaining installments. *Cincinnati v. James*, 55 O. S. 180.

Two or more persons claiming relief on the same ground may join in an action to enjoin the assessment or one may sue in behalf of others. *Upington v. Oviatt*, 24 O. S. 232. When cost may be divided, see *Reed v. Cincinnati*, 8 C. C. 393.

Owners may enjoin without first applying to the city solicitor. They do not sue as taxpayers. *Moore v. Cincinnati*, 15 B. 196.

Action to enjoin collection of assessment on ground that it is in excess of benefits is barred in four years after making of improvements by § 4982 R. S. *Gault v. Columbus*, 1 N. P. (N. S.) 201; 13 Dec. 575.

As to rights of court to fix amount properly chargeable, when assessment is enjoined because of technical irregularity or defect, see § 2289 R. S. (page 267) and note 3 thereunder.

For matters relating to defenses to suits to collect assessments, see notes under § 2286 R. S., page 265.

**Estoppel to contest.**—*Participation in causing improvement to be made.*—One who participates actively in causing an improvement to be made, by petitioning for the improvement, etc., is thereafter estopped to deny the authority of the municipality to proceed in the way sought and make the assessment. *Tone v. Columbus*, 39 O. S. 281. But he will not be estopped from objecting that the subsequent proceedings of council were not in conformity to statute. *Id.*

The property owner who has in-



duced the contractor to enter into a contract and do the work by assurances that he would be paid, is estopped to contest the validity of assessments on the ground that the contract was void because not founded on petition with the requisite number of signers. *Corry v. Gaynor*, 22 O. S. 584.

One who participated in the election of commissioners to carry out the improvement was held estopped to the same extent that a petitioner for the improvement would be estopped. *Columbus v. Slyh*, 44 O. S. 484.

The property owner would not be estopped from contesting the validity of assessments for water works because he had voted for the water works trustees, or had paid taxes, a part of which were for payment of interest on water works bonds. *Willard v. Close*, 25 B. 391.

Estoppel from executing paper setting forth that improvement was legally made, to enable municipality to issue its bonds, see *Shepard v. Barron*, 14 O. F. D. 417; 3 O. L. R. 327.

See further, as to estoppel under various former laws, *Bloch v. Godfrey*, 26 C. C. 781; 5 C. C. (N. S.) 318.

#### **Petitioning for improvement.**

—For matters relating to estoppel by petitioning for improvement, see notes under §§ 61 and 62 of the Code.

**Permitting improvement without objection.**—See, on question whether there can be estoppel from mere silence with knowledge that improvement is being made, *Columbus v. Agler*, 44 O. S. 485; *Wright v. Thomas*, 26 O. S. 346; *Andrews v. Settles*, 16 C. C. 638; but see *Tone v. Columbus*, 39 O. S. 281; *Quinlan v. Myers*, 29 O. S. 500; *Danks v. Phares*, 9 Rec. 554; *Birdseye v. Clyde*, 61 O. S. 27, 37; *Taylor v. Wapakoneta*, 26 C. C. 281.

The owner of land not having promoted the making of improvement is not estopped to contest the unconstitutionality of the assessment though he may have known of the improvement and of the intention to make the assessment. *Lewis v. Symmes*, 61 O. S. 471.

A property owner over whose land a sewer is run but who made no objection thereto until assessment, would be estopped to contest the assessment and must rely on his action for damages for the appropriation. *Wilson v. Cincinnati*, 5 N. P. 68.

The property owner who permitted a street to be improved without objection, knowing that his predecessor in title had undertaken to dedicate it but that the dedication had not been complete, would be estopped to resist assessment on the ground that the village had no title. *Neff v. Bates*, 25 O. S. 169.

Property owner, a part of whose property was taken by the city to straighten the street, but who discovered this before the surface improvement was begun and did not object, would be estopped to contest the assessment. *Cincinnati v. Longworth*, 4 Rec. 528.

Owners of property, a part of which has been encroached upon by a city in improving a street, but who made no objection until the work was done, would be estopped to contest the assessment though they might receive compensation for the land taken. *Cincinnati v. Goodman*, 5 Rec. 153.

#### **Payment of part of assessment.**

—Payment of part of assessment installments will not estop a property owner who has protested that

the work was not properly done according to contract. *Hartzell v. Alliance*, 39 B. 232. (Supr. Court not reported.) See also *Metcalf v. Carter*, 19 C. C. 196; *Cincinnati v. James*, 55 O. S. 180.

Payment of part of assessments in excess of benefits will not estop property owner from setting up defense that benefits are exceeded, where the steps in the improvement had been taken without his knowledge and he did not participate in any way in carrying forward the improvement. *Yost v. Ry. Co.*, 24 C. C. 169; 2 C. C. (N. S.) 519.

**Receiving compensation.**—The fact that the owner of property received compensation for part of his land taken would not estop him to resist the assessment for the improvement of the road because of its unconstitutionality. *Lewis v. Taylor*, 18 C. C. 443, 451.

**Unconstitutional statutes.**—The principles of estoppel apply as well where the proceedings of a corporation are questioned on the ground of unconstitutionality of a statute under which they are had as where they are attacked upon other grounds, unless such proceedings or what is sought to be accomplished by them are *per se* illegal or *malum prohibitum*. *Tone v. Columbus*, 39 O. S. 281, and see *Lewis v. Symmes*, 61 O. S. 471, and *State v. Mitchell*, 31 O. S. 592; *Wright v. Thomas*, 26 O. S. 346; *Murdock v. Cincinnati*, 25 B. 26; *Mt. Vernon v. State*, 71 O. S. 428; *Shepard v. Barron*, 14 O. F. D. 417.

**Extent of estoppel.**—A person may estop himself by his acts in promoting an improvement, to deny the legality of the action taken by the authorities with his consent, but he would not ordinarily be estopped to dispute an assessment on his property beyond the limitation fixed by law. *Birdseye v. Clyde*, 61 O. S. 27.

As to when an owner has estopped himself from disputing an assessment beyond the limitation, by express agreement in a petition for the improvement, see notes under § 62 *infra*.

**What persons estopped.**—The acts of owners who procure the improvement and assessment to be made will not operate as an estoppel of their intermediate mortgagees. *Donohue v. Brotherton*, 7 N. P. 367. But where the grantor is estopped his grantee is equally estopped. *Columbus v. Slyh*, 44 O. S. 484; and this is so even though the grantee bought without actual notice of the lien of the assessment. *Danks v. Phares*, 9 Rec. 554.

But the owner will not be estopped by the acts of his agent, signing for the property; though such acts would estop the agent were he owner. *Andrew v. Auditor*, 5 N. P. 123.

A purchaser agreeing in a deed to pay taxes or assessments for street improvements on the property is estopped to contest the validity of assessment which had been levied on the property at the time of the acceptance of deed. *Caldwell v. Columbus*, 37 B. 270; *Herman v. Columbus*, 15 Dec. 509; 3 N. P. (N. S.) 216; *Waldschmidt v. Bowland*, 27 C. C. 782; 6 C. C. (N. S.) 99 (aff'd 73 O. S. 350). But see *Lewis v. Taylor*, 18 C. C. 443 (aff'd on other grounds, 61 O. S. 471). But where it does not appear that the amount of the assessment was taken from the purchase price, or could have been known at time deed was made, assessment ordinance not yet having been passed, a mere recital that purchaser will pay street assessments, will not estop him from contesting their validity when levied. *Walsh v. Sims*, 65 O. S. 211.

**Change of judicial construction.**—Courts will not enjoin an assessment on the ground of the

unconstitutionality of the law under which it was levied, if the improvement is made and the assessment levied, and the bonds of the municipality issued, even though similar legislation has been held by the recent decisions of the court to be obnoxious to the constitution, if the law under which the assessment was levied is in all material respects similar to a law which has previously been held constitutional. *Shoemaker v. Cincinnati*, 68 O. S. 603; *Gault v. Columbus*, 13 Dec. 575; 1 N. P. (N. S.) 201; *Price v. Toledo*, 25 C. C. 617; 4 C. C. (N. S.) 57.

As to the case where the steps taken were in compliance with that part of a law which was constitutional, but a requirement of a law which would now be considered unconstitutional, was not complied with, see *Adkins v. Toledo*, 27 C. C. 417; 6 C. C. (N. S.) 433. Proceedings in such case held valid. *Ib.*

**Defect in work.**—Assessment for street improvement cannot be enjoined on ground of defect in the work, unless fraud is shown. *McGlynn v. Toledo*, 22 C. C. 34 (aff'd 67 O. S. 498). But see *Taylor v. Wapakoneta*, 26 C. C. 285. Where injunction is sought against assessment on the ground that the improvement was not made according to specifications, a claim made after the lapse of many years, must be supported by the clearest proof. *Gault v. Columbus*, 13 Dec. 575; 1 N. P. (N. S.) 201. But burden is on defendant to show that the defects appeared at such a time as would bar plaintiff's action. *Coit v. Columbus*, 13 Dec. 578; 1 N. P. (N. S.) 600.

As to estoppel to contest assessment on this ground, see *Tone v. Columbus*, 39 O. S. 281.

(3) **What property may be assessed.**—*Generally.*—Lands appropriated and used by a railroad company for its tracks are subject to the assessment for street improvement. *R. R. Co. v. Connelly*, 10 O. S. 159; *R. R. Co. v. Belmont Co.*, 19 O. S. 589.

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Street railway property may be assessed to pay the company's share of expense of paving between the tracks, as property subject to assessment, though not abutting. *Cleveland v. R. R. Co.*, 1 Clev. 304.

Property used as a wharf, is a lot subject to assessment. *Boeres v. Strader*, 1 C. S. C. R. 57.

Land cut in two by the street becomes two lots for assessment purposes, and each part must bear its own charge separately. *Spangler v. Cleveland*, 35 O. S. 469; *Younglove v. Hackman*, 43 O. S. 69.

Several lots owned by one person and abutting on the improvement, must be separately assessed; one lot cannot be liable for the aggregate amount assessed on all. *Corry v. Folz*, 29 O. S. 320.

Where lands are platted into lots the fact that the lot assessed is shallower than the rest will not be considered. *Locke v. Cincinnati*, 7 N. P. 318.

The area of a street put through the property to be assessed, since the improvement, is deducted from the property. *Coates v. Norwood*, 16 C. C. 196.

**Abutting property**—*What is.*—Abutting property would seem to include only that abutting the part of a street improved and not all property abutting on the entire street. *Creighton v. Scott*, 14 O. S. 438; *Scovill v. Cleveland*, 1 O. S. 126, 133; *R. R. Co. v. Connelly*, 10 O. S. 159; *Smith v. Toledo*, 24 O. S. 126, 130.

Where a city improved only ninety feet of a ninety-one foot strip dedicated to it for street purposes, leaving a strip of one foot on one side, the owners of property on that side are nevertheless liable to be assessed as owners of abutting property. *Richards v. Cincinnati*,



31 O. S. 506. Such an unused narrow intervening strip would exempt owners on that side from assessment, only in case it deprives them of the free and lawful access to their property. *Ib.*

An owner whose lot is separated from the street by a narrow strip, although he is licensed by the owner of the strip to use it for building purposes, such license, however, not having become irrevocable, is not an abutting owner. *Buse v. Cincinnati*, 28 B. 111.

Where the improvement is confined to one side of a street, the owners of lots abutting the other side would seem to be owners of lots abutting the improvement. See *Cincinnati v. Batsche*, 52 O. S. 324; *Dodsworth v. Cincinnati*, 18 C. C. 288.

Property on parts of the street beyond the ends of the improvement, is, not property bounding and abutting on the improvement for purposes of front foot assessment. *Cincinnati v. Batsche*, 52 O. S. 324; *Klein v. Cincinnati*, 7 C. C. 266 (affirmed without report, 33 B. 83); *Frey v. Findlay*, 7 C. C. 311, 319.

Approval of subdivision by council under § 2601 R. S. after a street assessment has been made, would not relate back so as to make only the abutting lots in the subdivision liable for assessments. *Cincinnati v. Corry*, 2 B. 337.

Where the front of a lot abutting on a street is owned by one person and the rear is owned by another, the street assessment by the front foot must embrace the entire lot as numbered and recorded, and the assessment must be apportioned between the owners in accordance with the part owned by each. *Frey v. Findlay*, 7 C. C. 311,

and see *Coates v. Norwood*, 16 C. C. 196.

What constitutes abutting property subject to assessment is to be determined by the situation of the property at the time of the improvement ordinance and is not affected by the sale of a strip off the front after such ordinance is passed. *Douglass v. Cincinnati*, 29 O. S. 165. And see *Shiner v. Norwood*, 17 C. C. 631.

**Contiguous and adjacent property**—*What is.*—The meaning of the words “adjacent and contiguous” can not be limited by any absolute or fixed measurement but must be determined by the circumstances of each case; yet for all practical purposes they may be said to embrace lots and lands “near to” the improvement, and all such when specially benefited are liable to be charged with the costs and expense, when contiguous and adjacent lands are included in the assessment. *Meissner v. Toledo*, 31 O. S. 387, 395.

**Property exempt.**—*School lands* are not liable for assessment for street or sidewalk improvements. *Toledo v. Board of Education*, 48 O. S. 83; *Board of Education v. Toledo*, 48 O. S. 87. And a statute making school property subject to assessment was held unconstitutional. *Board of Education v. Auditor*, 35 B. 294. But as to exemption of school property, see *Becker v. Columbus*, 18 C. C. 888; and see § 63 and notes. And where the school board held under a lease by which it agreed to pay the lessor’s burdens, property was held liable to assessment. *Cincinnati v. Board of Education*, 2 B. 184.

Institutions of public charity are not exempt from assessment for im-

provement. *Gilmour v. Pelton*, 2 B. 159.

Property of a cemetery corporation not exempt though exempted by law from taxation. *Lima v. Cemetery Association*, 42 O. S. 128.

Where property is dedicated to municipality on condition that lots abutting shall be exempt from improvement assessments without the consent of the majority such lots will not be exempt, for the condition is inoperative. *Richards v. Cincinnati*, 31 O. S. 506.

#### **Property in territory annexed.**

—Property annexed to a municipality after the improvement was ordered but before it was completed, may be included in the assessment. *Upington v. Oviatt*, 24 O. S. 232, 246.

As to the effect upon assessment of a condition in an agreement of annexation, see *Cincinnati v. Corry*, 2 B. 337. As to effect on assessment of previous improvement of property before its annexation to city, see *Cincinnati v. Monfort*, 3 B. 451.

(4) **Improvements by general taxation.**—Council is authorized in § 50 of the Code, above, to assess *any part* of the cost of improving streets, etc., upon abutting, adjacent or contiguous property. It has not the power to so assess *all* such cost, for it is restrained by § 53 of the Code and § 2284 R. S. (re-enacted in § 94 of the Code) and by the decisions cited thereunder. But council has power under § 32 of the Code to pay the entire cost of any and all public improvements *by general taxation* upon all the real and personal property in the corporation. Similar authority, though not so broad in scope, was given by §§ 2262 and 2263 R. S., repealed.

(5) **What costs and expenses included.**—See notes to § 2284 R. S., re-enacted in § 94 of the Code.

(6) **For what purposes assessments may be levied.**—Assessments may be made for grading and bowldering a street, under the general power to improve and assess. *Jessing v. Columbus*, 1 C. C. 90 (aff'd 22 B. 453; 23 B. 3.)

Assessments may be made and enforced though the proceeds go, not to pay for the work or the bonds issued in anticipation, but to reimburse the general fund, where the municipality, on account of delays in collection, had to pay the bonds out of the general fund. *Chamberlain v. Cleveland*, 34 O. S. 551.

An assessment may be made for the improvement of a public way, the right to which the public has acquired by prescription. *Duffy v. Norwood*, 3 N. P. 325.

The assessment can be levied only for the costs and expenses connected with the surface improvement of the street or public place. Costs and expenses connected with the appropriation of the property or with the satisfying of claims for damages to abutting property, cannot be included in the assessment. See notes to § 2284 R. S., under § 94 of the Code, *infra*.

**Improvement without title in municipality.**—A municipality has no power to improve private property for street purposes without the consent of the owner or appropriation proceedings, and therefore it cannot assess abutting property for such unauthorized improvement, even though the owner of lands assessed has been served with notice and received benefit. *Baker v.*

Norwood, 22 C. C. 173; see Harbeck v. Toledo, 11 O. S. 219.

Where acceptance by ordinance was required before dedication could be deemed complete, a street claimed by the municipality but not so accepted cannot be improved, and assessments for its improvement are void. *Merchant v. Waterman*, 3 W. L. M. 48.

Where the public street has been improved, the property owners cannot resist assessment on the ground that the site of the street was changed from a canal to the street without a new condemnation, or that a municipality had granted to a railroad company the right to use the street for its tracks. For any injury which may have been sustained by such changes in the use of the land, the remedy is by action for damages. *Richards v. Cincinnati*, 31 O. S. 506.

Where a city's right to improve a street depends upon the approval of the plan of improvement by the state board of public works, property owners cannot resist assessment by showing that certain details in the plan had not been duly approved. *Ib.*

**Title acquired later.**—The fact that a municipality has not acquired title to a part of the street on which improvement is made until after the work is contracted for will not make the assessment void. *Cincinnati v. Wilder*, 9 Rec. 727.

Though the city has not title to the property improved at the time the preliminary steps for the improvement were taken, yet if before the assessing ordinance is passed the property is duly acquired, the assessment will be legal. *Cincinnati v. Honnigfort*, 32 B. 32; *Weston v. Hamilton County*, 6 C. C. 641, 643 (affirmed without report,

30 B. 291); *Toledo v. Barnes*, 1 N. P. 185.

Where the city acquired title to the property improved after the work was begun and even after suit commenced to enjoin the assessment, the assessment was held valid. *Wilson v. Cincinnati*, 5 N. P. 63.

**Condition in city's title.**—

Where the municipality has acquired by dedication the land to be improved its title will not be defective because of a condition in the dedication, but such condition will be inoperative. *Richards v. Cincinnati*, 31 O. S. 506.

Where a city condemned turnpike property in the hands of county commissioners as an abandoned road, the city's title will not be defective because of conditions of the grant to the turnpike company, of its roadway. *Cincinnati v. Schoenberger*, 2 B. 128.

**Estoppel to deny title.**—The land owner who permits the street to be improved, knowing that his predecessor in title had undertaken to dedicate it would be estopped to contest the assessment. *Neff v. Bates*, 25 O. S. 169.

A property owner over whose private property, not yet acquired by a city, a sewer has been put, but who made no objection thereto at the time of the improvement, cannot resist the assessment for the improvement. His only remedy is damages for the appropriation. *Wilson v. Cincinnati*, 5 N. P. 68.

As to estoppel to resist an assessment for improvement including private property not yet properly acquired by the city where the lot owner permitted the improvement to go on without objection, see *Cincinnati v. Schoenberger*, 2 B. 128; *Cincinnati v. Longworth*, 4 Rec.



528; *Cincinnati v. Goodman*, 5 Rec. 153.

**Street between two municipalities.**—Where the street divides a city from a village each municipality may improve the part within its boundaries and assess abutting owners and the difference in the amount between the assessments will not make them void for want of uniformity. *Scully v. Cincinnati*, 1 C. S. C. R. 183.

**(7) Percentage of tax value.**—Under former laws the statute limiting the amount of assessment to a proportion of the tax value of abutting property was held to mean the value fixed by the decennial appraisal in force when the improvement ordinance was passed and not the one in force at the date of the assessment. *Crossley v. Findlay*, 10 C. C. 286.

**(8) Proportion to benefits.**—Where an assessment is made in proportion to benefits, the amount of the assessment must be apportioned among the several lots and parcels of land specially benefited, in proportion to the special benefit which each lot or parcel bears to the whole special benefit conferred by the improvement. *Chamberlain v. Cleveland*, 34 O. S. 551.

Such assessment is of course limited to the benefit and cannot be in excess thereof. *Ib.*

An assessment cannot be levied part by front foot and part by benefits. *Dick v. Toledo*, 11 C. C. 349.

As to validity of assessment purporting to be according to benefits, but actually by the front foot, see *Nulsen v. Cincinnati*, 27 C. C. 383; 5 C. C. (N. S.) 679.

**(9) By the foot frontage.**—Constitutionality of assessments by foot frontage, when properly made by a municipal corporation for street improvements, is well settled. *Chamberlain v. Cleveland*, 34 O. S. 551. See further, *Norwood v. Baker*, 172 U. S. 269, as interpreted

in *French v. Barber Asphalt Co.*, 181 U. S. 324; *Crawford v. Cincinnati*, 26 B. 215.

Assessment made in terms by the abutting foot is valid, if it does not, in fact, exceed the special benefits. *Shoemaker v. Cincinnati*, 68 O. S. 603.

Where the assessment is by the foot frontage of abutting property the rate of the assessment must be uniform upon all the property assessed. *Jaeger v. Burr*, 36 O. S. 164.

The words "front foot" must be interpreted by their popular meaning. *Betz v. Canton*, 18 C. C. 676.

As to what assessment may be deemed to be a front foot assessment, see *Cincinnati v. Batsche*, 52 O. S. 324.

It was held that where the assessment was by the front foot the owners were liable according to the feet front assessable when the work was ordered and the assessment made, and not according to the frontage as afterwards reduced by appropriation. *Spangler v. Cleveland*, 35 O. S. 469.

Lands not subdivided. See § 50a, p. 192.

**Real frontage—Corner lots, etc.**—In assessing the cost of a street improvement on abutting property by the front foot regard must be had as to what is the real front of the property. This is a question of fact to be determined by the manner in which it was laid out or in which it has been built upon and used and occupied by the owner. *Haviland v. Columbus*, 50 O. S. 471; and the lengthwise side of a corner lot abutting on street improved cannot be assessed for the number of feet on that side, but only for the number of feet which the lot has at its real front. *Ib.*

The frontage of the lot is to be determined by its situation when the improvement is made and not by its situation later, after changes, and where a lot owner after improvement but before assessment builds on the rear of a corner lot houses fronting on the street improved, the assessment cannot then

be made as though the parts of the lot built upon fronted on the side street, but must be made only on the real or narrow frontage of the entire lot as it was before the houses were built. *Sandrock v. Columbus*, 51 O. S. 317.

The frontage of a corner lot, determined by the improvements on it, depends on the permanent and not on the temporary improvement. *Burggreve v. Cincinnati*, 1 N. P. 80; a side gate entrance will not constitute the side of the lot a front. *Ib.*

A tenement building on the rear of a corner lot would sever that part and make it a new lot and only the rest is subject to the corner lot rule. *Wehage v. Cincinnati*, 1 N. P. 82. And this is so even though the building cuts across and ignores platted lines of the lot. *Matthews v. Cincinnati*, 16 B. 249.

As to other circumstances that will tend to show that the lengthwise side of a corner lot is also a front and thus assessable as such, see *Barney v. Dayton*, 8 C. C. 480; *Schmidt v. Cincinnati*, 1 N. P. 48; *Betz v. Canton*, 32 B. 92; *Toledo v. Sheill*, 53 O. S. 447; *Shattuck v. Cincinnati*, 1 N. P. 394; *Duffy v. Norwood*, 12 C. D. 675; *Meyer v. Cincinnati*, 1 N. P. 81.

But mere side entrances to a main building or entrances to a subordinate building, such as a stable, will not make the lengthwise side of the lot a front, *Betz v. Canton*, 18 C. C. 676; nor a gate on the side for delivery of coal, *Manns v. Cincinnati*, 10 C. C. 549; (54 O. S. 257); nor the fact that rooms in the rear of a store building are reached by entrance on the lengthwise side with a vacant yard in the rear, *Metcalf v. Carter*, 19 C. C. 196; nor the fact that there

is an entrance on the side street to a barn, *Daiber v. Toledo*, 7 N. P. 389; nor the fact that there are doors and halls for access from a side street to a building fronting toward the end, though such entrances are frequently used, *Toledo v. Sheill*, 53 O. S. 447; nor that there are outbuildings which are accessible only from the side street but whose use is incidental to the occupation of the building, *Ib.*

The frontage of a vacant lot is presumed to be its narrow end, *Toledo v. Sheill*, 53 O. S. 447.

The fact that a building was erected on the rear of a lot since the improvement does not prevent the corner lot rule from applying. *Metcalf v. Carter*, 19 C. C. 196.

Where there are four lots owned by one person fronting on one street, with a side street along the side of one of them the fact that the owner has put up a house on two of the lots farthest from the side street but not fronting thereon, will not justify assessment for entire amount of abutting feet on side street. *Wolfe v. Avondale*, 14 C. C. 375; and where a single lot has two houses on it, the assessment for the lengthwise side can be only for the amount of frontage of the part on which the one building nearest the side street is placed. *Bentley v. Toledo*, 7 N. P. 388.

As to the case of an irregularly shaped lot, see *Reed v. Cincinnati*, 31 B. 279.

As to assessment of triangular lot, see *Thompkins v. Norwood*, 1 N. P. 83; *Toledo v. Ainsworth*, 7 N. P. 391. *Reed v. Cincinnati*, 31 B. 279; *Calkins v. Toledo*, 12 C. C. 202.

A lot fronting on three streets having a front at each end and on the side street can be assessed the

foot frontage on both the front streets for the improvement of the side street. *Cincinnati v. Manss*, 54 O. S. 257, 262.

Where improvement is in rear of lot, assessment can only be according to width of front of lot. *Fridman v. Norwood*, 1 C. C. (N. S.) 97; 25 C. C. 258 (aff'd 49 B. 99).

Where a street runs around three sides of a lot the assessment must be apportioned to approximate uniformity. *Locke v. Cincinnati*, 7 N. P. 318.

Court will consider prior leases or conveyances in determining how much land belongs to a corner lot for the purpose of determining the assessable frontage. *Cincinnati v. James*, 2 N. P. 345.

As to estoppel to claim that lot should be assessed only by the amount of frontage on its real front, because of admissions in a petition for the improvement, see note "Estoppel to deny frontage" under § 62 of the Code.

**Sec. 50a.** [When council shall fix fair average depth for lands not subdivided into lots.]<sup>1</sup> In making special assessments by percentage of the tax value or by the foot front on lots or lands not subdivided into lots, when such lots or lands are not assessed for taxation, the council shall fix, for the purpose of said assessment, the value of said lots as they stand and of said lands to what council may consider a fair average depth of lots in the neighborhood, so that it will be a fair average of the assessed value of other lots in the neighborhood, and in making such assessments in either of said ways on land not subdivided into lots but which are assessed for taxation, council shall fix the value and depth in the same manner.<sup>2</sup> Provided, however, the above rule shall not apply in making special assessment according to benefits. [1904, April 23, 97 v. 296.]

(1) **Old sections.**—See old § 2269 R. S. (repealed) and §§ 2264a and 2271 R. S. (repealed).

(2) **Land in bulk, how determined.**—To determine whether land is in bulk or in city lots regard must be had not only to recorded plat, but size of lots generally. *Bailey v. Zanesville*, 20 C. C. 236; *Springer v. Avondale*, 35 O. S. 620.

A tract may be a lot and not land

in bulk, though not platted, if not larger than fair average of lots. *Gibson v. Cincinnati*, 27 B. 80.

Situation of property at time of improvement ordinance governs, in determining whether land is in bulk or not. *Shiner v. Norwood*, 17 C. C. 631.

**Purpose of provisions.**—A provision such as this is intended to equalize the expense upon all land benefited. Where land is in bulk,



council must determine a fair average depth for such land for the purpose of the assessment and fix a value for such part as is assessed, so that it can be seen whether the limitation on assessments has been exceeded and on what part of the land the lien of assessment attaches. *Bailey v. Zanesville*, 20 C. C. 236; *Parmelee*

*v. Youngstown*, 43 O. S. 162; *Findlay v. Frey*, 51 O. S. 390; *Cincinnati v. Oliver*, 31 O. S. 371; *Griswold v. Pelton*, 34 O. S. 482.

**Injunction** will lie to restrain collection of assessment on land in bulk where council has not fixed fair average depth. But court may fix amount properly chargeable. *Griswold v. Pelton*, 34 O. S. 482.

**Sec. 51. [Resolution of necessity; plans, specifications; estimates and profiles to be prepared and filed in office of department of public service.]**<sup>1</sup> Whenever it is deemed necessary by any city or village, to make any public improvement to be paid for in whole or in part by special assessments <sup>2</sup> council shall declare by resolution (three-fourths of the whole number elected thereto concurring, except as otherwise provided herein), the necessity of such improvement.<sup>3</sup> At the time of the passage of said resolution council shall have on file in the office of the board of public service in cities, and of the clerk in villages, plans, specifications, estimates and profiles of the proposed improvement, showing the proposed grade of the street and improvement after completion, with reference to the property abutting thereon, which plans, specifications, estimates and profiles shall be open to the inspection of all persons interested. Said resolution shall determine the general nature of the improvement, what shall be the grade of the street, alley, or other public place to be improved, as well as the grade or elevation of the curbs and approve the plans, specifications, estimates and profiles for the proposed improvement.

**[Council to determine method of assessment, etc.]** Council shall also determine in said resolution the method of the assessment, the mode of payment thereof, and shall determine whether or not bonds shall be issued in anticipation of the collection of

the same.<sup>4</sup> Assessments for any improvement may be payable in one to ten installments and at such time as council may prescribe, and when bonds are issued in anticipation of the collection of the assessment, the interest thereon shall be treated as part of the cost of the improvement for which assessment may be made. If said assessment or any installment thereof shall not be paid when due, they shall bear interest until the payment thereof at the same rate as the bonds issued in anticipation of the collection of the same, and the county auditor shall annually place upon the tax duplicate the penalty and interest therein provided for.<sup>5</sup>

[**Publication of resolution.**] Said resolution shall be published according to section 124 of the act of which this is amendatory, but shall take effect upon its first publication.<sup>6</sup>  
[1904, April 21, 97 v. 121.]

(1) **Old sections.**—See old §§ 2304, 2264 and 2264a R. S. repealed.

(2) **Procedure limited.** — It seems that the procedure here required is limited to the making of public improvements *for which special assessments are to be levied*. Other improvements are required to be made in the manner provided in the sections of the Code governing the appropriation of private property and the duties with respect to contracts of the council, directors of public service, directors of public safety and trustees of public affairs.

See, in accord, *East End B. & T. Co. v. Cleveland*, 1 N. P. (N. S.) 493 (aff'd Cir. Ct.).

Compare old § 2304 R. S., repealed, which provided that "when it is deemed necessary by a city or village to make a public improvement" council shall declare the necessity, give notice to the owners of abutting property, etc. Ques-

tions as to what public improvements required the procedure provided in § 2304 arose in *Krumberg v. Cincinnati*, 29 O. S. 69; *Caldwell v. Carthage*, 49 O. S. 334; *Tyler v. Columbus*, 6 C. C. 224; *Becher v. McCloud*, 4 C. C. 305; *Nitzel v. St. Bernard*, 3 N. P. 317; *Fergus v. Columbus*, 6 N. P. 82, 91; *Garvin v. Columbus*, 5 N. P. 236, 239; *Rademacher v. Cincinnati*, 21 B. 244; *Longworth v. Cincinnati*, 23 B. 100; *Strauss v. Cincinnati*, 24 B. 422.

(3) **Resolution of necessity.**—*Due passage jurisdictional.*—Resolution declaring necessity and its due publication were held to be conditions precedent, under former statutes, to the power of council to pass the improvement ordinance. *Welker v. Potter*, 18 O. S. 85; *Stephan v. Daniels*, 27 O. S. 527; *Smith v. Toledo*, 24 O. S. 126; *Cincinnati v. Corry*, 2 B. 337. But see *Upington v. Oviatt*, 24 O. S. 232.

*Object of resolution.*—Though the legislature, in providing for the adoption and publication of preliminary resolution had in view, under former § 2304 R. S. the fixing of time within which those claiming damages must make their claims, yet this was not the only object of the requirements. They were calculated to prevent a hasty and inconsiderate exercise of power. *Smith v. Toledo*, 24 O. S. 126, 132.

*Passage of resolution.*—Such a resolution would be a resolution of a general or permanent nature within the meaning of § 1694 R. S.; *Campbell v. Cincinnati*, 49 O. S. 463; *Thatcher v. Toledo*, 19 C. C. 311, 315; but see *Upington v. Oviatt*, 24 O. S. 232.

*Resolution, what to contain.*—Resolution sufficiently establishes grade and orders improvement if it refers to plans and specifications on file in office of engineer though that office is located outside of village. *Wood v. Pleasant Ridge*, 12 C. C. 177.

Where resolution is broad enough to cover improvement including retaining wall it is not necessary that another resolution declaring necessity for retaining wall be passed to authorize separate contract for such wall found necessary after work partly done and paid for by assessment. *Cincinnati v. Shaw*, 3 B. 556. Separate item not specified in resolution may nevertheless be authorized. *Dixon v. Cincinnati*, 11 C. C. 629. Resolution may except an intermediate part of the street to be improved. *Wilder v. Cincinnati*, 26 O. S. 284. It may order improvement of several streets or parts of streets if all is but one improvement. *Irwin v. Greenville*, 1 Dayton, 140.

*Construction.*—Resolution to improve a street one side only of which is within city limits will be construed to mean the improvement of that part only which is within the city. *Scully v. Cincinnati*, 1 C. S. C. R. 183, 187.

As to construction of resolution or ordinance not clearly defining termini of improvement, see *Ridenour v. Saffin*, 1 Handy, 464.

What defects in resolution cured by curative statute, see notes under § 2289 R. S., p. 267.

*Method of assessment* described in resolution or ordinance to improve cannot be departed from and a different method adopted when assessment is made. *Dick v. Toledo*, 11 C. C. 349. As to method of assessment which might be prescribed under former statutes, see *Kelley v. Cleveland*, 34 O. S. 468; *Irwin v. Greenville*, 1 Dayton, 140; *Dick v. Toledo*, 11 C. C. 349.

(4) **Right to pay cash.**—Where the assessing ordinance fails to provide the right to pay all assessments in cash, the ordinance is not void, but the owner may still exercise the right. *Dodsworth v. Cincinnati*, 18 C. C. 288.

(5) **Collection of installments.**—Such installments are to be placed on the tax duplicate and collected as other taxes. *Makley v. Whitmore*, 61 O. S. 587.

By § 94 of the Code it is made the duty of the clerk of council to certify *all* installments of assessments, whether past due or not, to the county auditor annually (where bonds are issued in anticipation of their collection), and such assessments are then collected as other taxes.

See note 2 under § 2286 R. S., p. 265.



*Assessment on tax duplicate prima facie valid* and the burden is on the property owner to show invalidity. *Murphy v. Sims*, 13 Dec. 62.

(6) **Publication.** — *How made.* — See note to § 124 of the Code.

*Effect of omission to publish.* — Publication of the preliminary resolution as required by former statutes was held to be mandatory as

between the municipality and the owners of property assessed. *Upington v. Oviatt*, 24 O. S. 232.

And omission to publish the preliminary resolution is a fatal defect which is not cured by a curative act relating to technical irregularities. *Welker v. Potter*, 18 O. S. 85. But see *Upington v. Oviatt*, 24 O. S. 232, and see *Bolton v. Cleveland*, 35 O. S. 319.

### ORDER OF PROCEDURE IN STREET IMPROVEMENTS FOR WHICH ASSESSMENTS ARE LEVIED.

1. *Resolution of necessity* (three-fourths of council concurring), and determining grade, approving plans, specifications and estimates, and fixing the method of assessment, the mode of payment, and whether or not bonds shall be issued in anticipation of collection. (§51 of the Code.)

This resolution may be passed at one meeting only by suspension of rule provided in § 122 of the Code. It must be published. (§§ 51 and 124 of the Code.)

2. *Notice to the owners of property to be assessed*, served by the clerk of council or an assistant, and on non-residents by publication. (§ 52 of the Code.)

3. *Claims for damages*, to be filed by the owners of abutting property. (§ 54 of the Code.)

4. *Ordinance to proceed with the improvement* (three-fourths of council concurring; see § 61 of the Code), determining whether claims for damages shall be judicially inquired into before commencing or after the completion of the improvement; directing the solicitor or mayor to institute proceedings to inquire into such claims; determining the mode of payment for the improvement; setting forth specifically the lots and lands to be assessed; describing the general nature of the improvement and the character of materials to be used; giving a reference to the improvement resolution theretofore passed, with the date of its passage and the declaration of intention to proceed with the improvement in accordance with said resolution and plans. If the estimated cost of the improvement is more than five hundred dollars, this ordinance should, in cities, authorize and direct the board of public service to make a contract with the lowest and best bidder, after advertisement according to law; and in villages, the ordinance should direct the clerk to advertise for bids, and the contract should be awarded by council to the lowest and best bidder, and executed by the mayor and clerk. If the estimated cost is less than five hundred dollars, the contract may be made by the board of public service in cities, and by council in villages, without advertisement. (§§ 55, 59, 143, 144 and 198 of the Code.)

This ordinance may also be passed at one meeting by suspending the

rule, and should be published. (See §§ 122 and 124 of the Code, and § 1695 R. S. re-enacted in § 124 of the Code.)

5. *Application for a jury* to inquire into claims for damages. (§ 56 of the Code.) (If, in the ordinance to proceed, it has been determined to inquire into the damages after the completion of the improvement, the inquiry should follow such completion.)

6. *Advertisement for bids.* (See §§ 59, 143, 144 and 198 of the Code.)

7. *Award and execution of contract.* (§§ 59, 143, 144 and 198 of the Code.)

8. *Appointment of three disinterested freeholders*, and equalizing of assessments where the assessment is in proportion to benefits. See "Order of procedure for assessments by benefits," under § 68 of the Code.

9. *Assessing ordinance.* There is no requirement that the ordinance levying the assessment shall have more than a majority vote of council, and there seems to be none that it should be published, though its publication would be advisable. An assessing ordinance might, as to method of passage, be regarded as the levying of a tax and should be read on three different days unless three-fourths of council suspend the rule. § 122 of the Code.

#### FORM OF RESOLUTION DECLARING NECESSITY FOR IMPROVEMENT.

Resolution No.....

Declaring it necessary to improve.....street from..... to .....by paving (or constructing sewer or making other improvement).

Be it resolved by the council of the city [or village] of ....., State of Ohio, three-fourths of all members elected thereto concurring:

Sec. 1. That it is necessary to improve.....street, from..... to....., in the following manner (here describe general nature of the improvement, materials to be used, etc.);

Sec. 2. That the grade of said street as improved shall be..... ("the existing grade," or "the grade established by ordinance passed .....", or specifically describe the grade to be established as shown by the engineer's plans); and that the grade of the curbs shall be..... (here insert grade of curbs in relation to that of street).

Sec. 3. That the plans, specifications, estimates and profiles of the proposed improvement heretofore prepared by the engineer [or street commissioner] and now on file in the office of the department of public service [or in villages, of the clerk], be and the same are hereby approved.

Sec. 4. That the whole cost of said improvement, less one-fiftieth thereof and the cost of intersections [or "..... per cent. of the whole cost of said improvement, less the cost of intersections"], shall be assessed by a percentage of the tax value thereof [or, "in proportion to the benefits which may result from the improvement," or, "by the foot frontage"] upon the

following described lots and lands, to-wit: all lots and lands bounding and abutting upon the proposed improvement (or, here describe specifically benefited territory to be assessed) which said lots and lands are hereby determined to be specially benefited by said improvement; and the cost of said improvement shall include the expense of the preliminary and other surveys, and of printing and publishing the notices, resolutions and ordinances required, and the serving of said notices, the cost of construction, together with interest on bonds issued in anticipation of the collection of deferred assessments, and all other necessary expenditures.

Sec. 5. That the assessments so to be levied shall be paid in..... annual installments, with interest on deferred payments at .....per cent per annum; provided, that the owner of any property assessed may, at his option, pay such assessment in cash within.....days from and after the passage of the assessing ordinance, in which case said cash assessment shall not include any item of interest upon bonds to be issued in anticipation of the collection of deferred installments of assessments.

Sec. 6. That bonds of the city [or village] of .....shall be issued in anticipation of the collection of assessments by installment and in an amount equal thereto.

Sec. 7. That the remainder of the entire cost of said improvement, not specially assessed, including the cost of intersections, together with the cost of any real estate or interest therein, purchased or appropriated, and the costs and expenses of any appropriation proceeding therefor, and the damages awarded any owner of adjoining lands and interest thereon, and the costs and expenses of any such award, shall be paid out of..... fund [or "by the issuance of bonds in the manner provided by law"].

Sec. 8. This resolution shall take effect and be in force from and after the earliest period allowed by law.

Passed....., 19....

Attest.

.....  
Clerk.

.....  
President of Council.

**Sec. 52. [Notice; how served.]**<sup>1</sup> A notice<sup>2</sup> of the passage of the resolution required in the last preceding section shall be served by the clerk of council, or an assistant, upon the owner<sup>3</sup> of each piece of property to be assessed<sup>4</sup> in the manner provided by law for the service of summons in civil actions, provided, that if any of said owners or persons be not residents of the county, or if it appears by the return, in any case, of the notice that such owner cannot be found, then a notice of the



passage of said resolution shall be published at least twice in some newspaper of general circulation within the corporation, and such notice, whether by service or publication, shall be completed at least twenty days before the improvement is made or the assessment levied, and the return of the officer or person serving such notice, or a certified copy of said return shall be *prima facie* evidence of the service of the notice as herein stated.<sup>5</sup> [1904, April 21, 97 v. 122.]

(1) **Old section**, 2304 R. S. repealed.

(2) **Strict construction.**—Requirements as to notice must be strictly pursued. *Cincinnati v. Sherike*, 47 O. S. 217.

**Must be written.**—Notice that is required is a notice in writing. *Cincinnati v. Sherike*, 47 O. S. 217.

**Sufficiency.**—Notice that a resolution was adopted declaring it necessary to open and improve a certain street between certain points by grading, etc., (specifying the manner of improvement) according to plans on file stating that the expense was to be charged per front foot upon lands abutting was held to be sufficient under former sec. 2304. *Canton v. Wagner*, 54 O. S. 329.

Notice that resolution declaring it necessary to improve a certain street between certain points and stating the manner of assessing cost was held not sufficient to inform the property owner that the city contemplated appropriating an easement for sloping fill. *Fenner v. Cincinnati*, 4 N. P. 182.

A resolution to improve by change of grade should set forth specifically extent and character of the grade so that owners may know the effect

upon their land. See *Cincinnati v. Corry*, 23 B. 359.

**Service of notice.**—Under former § 2304, it was held that the service of the notice must be personal. *McGee v. Avondale*, 7 C. C. 246, but if notice was left at the residence or mailed and was duly received it would be sufficient. *McGee v. Avondale*, 7 C. C. 246; *Green v. Cincinnati*, 7 C. C. 233.

**Effect of want of notice.**—The service of notice to resident land owners, required by old § 2304, was held to be a condition precedent to the exercise of the authority to pass a valid ordinance ordering the improvement so far as such owners are concerned or to make an assessment on their property to pay for the same, and the failure to give notice is not such an irregularity as would be cured by a curative statute. *Joyce v. Barron*, 67 O. S. 264, 268; but see further, *Toledo v. McMahon*, 9 C. C. 194; *Kirby v. Winton Place*, 7 N. P. 169; *Schmidt v. Elmwood Place*, 15 C. C. 351; *Knecht v. Cincinnati*, 18 C. C. 875; and as to construction of requirement under various former statutory provisions, see *Bolton v. Cleveland*, 35 O. S. 319; *Scovill v. Cleveland*, 1 O. S. 126; *Chittenden*

v. Columbus, 1 N. P. (N. S.) 420; 14 Dec. 333.

An owner who has not received notice will not forfeit his right to recover damages caused by the improvement because of failure to file claim. *Fenner v. Cincinnati*, 4 N. P. 182.

(3) **Owner** would mean any one having an interest in the real estate and includes mortgagees and owners of minor interests therein. *Savings Co. v. Cincinnati*, 12 Dec. 218. See also *Allison v. McCune*, 15 O. 726; *Smith v. Altick*, 24 O. S. 369, 377; *Carpenter v. Canal Co.*, 35 O. S. 307, 317; *Harrison v. Sabina*, 1 C. C. 49.

See also *Hopple v. Cincinnati*, 16 Dec. 557 (reversed Super. Ct. Gen. term).

Service on lessee for ten years with privilege of purchase and in whose name property is assessed for taxation, held sufficient. *Clemmer v. Cincinnati*, 28 C. C. 89; 7 C. C. (N. S.) 31.

Service of notice on person in whose name property is assessed on tax duplicate, if not real owner, held not sufficient. *Savings Co. v. Cincinnati*, 12 Dec. 218.

State need not be served where property is forfeited to state for taxes. *Ib.*

(4) **To whom notice required.**—No notice seems required to be served except upon the owners of property to be assessed. Old § 2304 R. S., repealed, required notice to all owners of abutting property. The chief purpose of this notice was

held to be the giving of an opportunity to file claims for damages. *Savings Co. v. Cincinnati*, 12 Dec. 218. The purpose of the notice now required seems to be two-fold, viz.: (1) To give the owners of property to be assessed an opportunity to be heard against the improvement or the assessment therefor, and (2) To give such owners an opportunity to file any claims there may be for damages. It follows that the owner of property not to be assessed and to whom no notice of a proposed improvement is given, need not file a claim under § 54 in order to recover damages sustained, but is left to his remedy against the municipality independent of such section. The property to be assessed, however, will usually include all that may be damaged by the improvement. See *East End B. & T. Co. v. Cleveland*, 1 N. P. (N. S.) 493; *Anderson v. Columbus*, 1 N. P. (N. S.) 541; 14 Dec. 180.

*Notice not waived* by petitioning for improvement, unless expressly stated in petition. *Joyce v. Barron*, 67 O. S. 264.

(5) **Prima facie evidence.**—The return of the officer serving the notice was held *prima facie* evidence of service under old § 2315 R. S., repealed, and the burden of proof was said to be upon the property owner who denied the service. *Strauss v. City*, 23 B. 359.

## FORM OF NOTICE TO OWNERS OF PROPERTY TO BE ASSESSED.

To.....:

You are hereby notified that on the.....day of....., 19...., the council of the city [or village] of....., State of Ohio, duly passed Resolution No..... to improve.....street from.....to.....by (here describe character of improvement) in accordance with the plans, profiles, specifications and estimates on file in the office of the department of public service [or in villages, of the clerk], and that

the grade of the street and curbs shall be as follows: (here repeat description of grade of street and curbs as shown in improvement resolution).

That the costs and expenses of said improvement will be assessed as follows: (here repeat the method of assessment and the lots and lands or territory to be assessed as shown in the improvement resolution).

By order of the council of the city [or village] of.....

.....  
Clerk.

(If the assessment is to be by the front foot this notice should go to all abutting owners. If by percentage of tax value or according to benefits, it should go to all whose property may be included in the subsequent assessing ordinance.)

#### FORM OF RETURN BY OFFICER SERVING NOTICE.

Received the above notice on the.....day of....., 19...., and served the same by delivering a true copy thereof personally, (or insert any other method in accordance with requirements of law for service of summons in civil actions) upon the following persons on the dates below specified:

| Name. | Date of service. | Remarks.                                                 |
|-------|------------------|----------------------------------------------------------|
|       |                  | Clerk [or assistant] of the City<br>[or Village] of..... |

**Sec. 53. [Limitation of assessments.]**<sup>1</sup> In all cases of assessments, the council shall limit the same to the special benefits<sup>2</sup> conferred upon the property assessed, and in no case shall there be levied upon any lot or parcel of land in the corporation any assessment or assessments for any or all purposes, within a period of five years, exceeding  $33\frac{1}{3}$  per cent. of the actual value thereof after improvement is made;<sup>3</sup> provided, that the assessments levied for the construction of main sewers<sup>4</sup> shall not exceed the sum that would in the opinion of council<sup>5</sup> be required to construct an ordinary street sewer or drain of sufficient capacity to drain or sewer the lots or lands to be assessed for such improvement, nor shall any lots or lands be assessed that do not need local drainage or which are provided therewith.<sup>6</sup>

**[Municipality to pay portion of cost of improvement; as to intersections.]** In all municipalities the corporation shall pay such part of the cost and expense of improvements for which special assessments are levied as council may deem just, which



part shall not be less than one-fiftieth of all such cost and expenses; and in addition thereto, the corporation shall pay the cost of intersections;

[**Limitation as to reassessment.**] provided, that whenever special assessments have been levied and paid, for the improvement of any street or other public place the property so assessed shall not again be assessed for more than one-half the cost and expense of repaving or repairing such street or other public place unless the grade of the same is changed;<sup>7</sup>

[**Municipality may issue bonds to pay its share of costs.**] provided, that any city or village is hereby authorized to issue and sell its bonds as other bonds are sold to pay the corporation's part of any improvement as aforesaid, and may levy taxes in addition to all other taxes authorized by law to pay such bonds and the interest thereon.<sup>8</sup> [1904, April 21, 97 v. 126.]

(1) **Old sections.**—Old § 2264, R. S. (repealed). See also old § 2283 R. S. (repealed). For old § limiting assessments to percentage of tax valuation, see § 2270 R. S. (repealed). Former statutes limiting assessments to percentage of actual value were §§ 2271 and 2264a R. S. (repealed).

Compare also § 2380 R. S., repealed, relating to limitation of sewer assessments.

(2) **Limited to special benefits.**—Even without any statute expressly limiting assessments to the special benefits conferred, the courts have reached the conclusion that they must be so limited in order to be constitutional. In *Walsh v. Barron*, 61 O. S. 15, the court says that "it is a fundamental principle underlying special assessments that the property is specially benefited by the improvement beyond the benefit to the public and a ratable assessment to the extent of such benefit is proper and constitutional, but in no case can it exceed the benefits." See also *Schroder v. Overman*, 61 O. S. 1; *Dayton v. Bauman*, 66 O. S. 379; *Walsh v. Sims*, 65 O. S. 211.

Benefits from the improvement

can not be estimated on basis that before improvement lots had become depreciated in value because municipality had improperly allowed street to become a public dump. *Kummer v. Cincinnati*, 27 C. C. 683; 6 C. C. (N. S.) 559.

Courts will not enjoin an assessment claimed to be in excess of special benefits where excess is because of depreciation in value since improvement. *Murphy v. Sims*, 13 Dec. 62; *Borger v. Columbus*, 27 C. C. 812; 6 C. C. (N. S.) 401.

An assessment merely showing that it is placed on "benefited property" will not be conclusively presumed to be limited to special benefits. *Chamberlain v. Cleveland*, 34 O. S. 551.

Where the assessment is according to benefits the whole amount of the benefit must be apportioned amongst the lots in proportion to the benefit of each. *Ib.*

But it is not necessary that the total excess of benefits be first ascertained before total assessment is distributed among the various lots. It is sufficient that the assessment of each lot does not exceed the benefit to that lot and that it bears only its just proportion of total assessment.

Blair v. Cary, 24 C. C. 560; 2 C. C. (N. S.) 25; Ayers v. Toledo, 26 C. C. 767 (reversed on other grounds, 72 O. S. 651). See further, note under § 63, *infra*.

An ordinance which levies the assessment upon abutting property by the front foot without further provision, though it does not limit it to benefits, was held not void if in fact it could be shown that the assessment did not exceed the special benefits conferred. *Queen City Foundry Co. v. Cincinnati*, 8 N. P. 167; *Shoemaker v. Cincinnati*, 68 O. S. 603; *Schroder v. Overman*, 61 O. S. 1; and see *Norwood v. Baker*, 172 U. S. 267, as interpreted in *French v. Barber Asphalt Co.*, 181 U. S. 324.

**Where benefits exceeded; power of court.**—Where the assessment has exceeded the benefits, the court, in a suit to collect the assessment or a suit to enjoin the collection, may determine what amount may properly be assessed and enjoin collection of the balance only. *Walsh v. Sims*, 65 O. S. 211; *Benham v. Cincinnati*, 26 C. C. 17.

Where, however, the proper municipal authorities have determined that the assessment does not exceed the benefits, such finding and assessment are *prima facie* correct, and the court should not interfere to disturb the assessment, unless so manifestly unjust as to be tantamount to fraud on the part of the authorities. *Price v. Toledo*, 25 C. C. 617; 4 C. C. (N. S.) 57; *Benham v. Cincinnati*, 26 C. C. 17; see also *Chamberlain v. Cleveland*, 34 O. S. 551; *Mechlem v. Cincinnati*, 28 C. C. 216; 7 C. C. (N. S.) 212. The burden of proof is on the plaintiff to show that assessment exceeds benefit. *Yost v. Railway Co.*, 24 C. C. 169; 2 C. C. (N. S.) 519.

**Waiver of limitation.**—The limitation that assessments must not exceed benefits may be waived by contract by persons petitioning for the improvement. *Thornton v. Cincinnati*, 26 C. C. 33; 4 C. C. (N. S.) 31.

For matters relating to estoppel to contest assessment as exceeding benefits, because of petitioning for the improvement, see notes under § 62 of the Code.

**(3) Percentage of actual value.**

—In no event can the lot owner be assessed for more than his ratable

share of the actual cost and expense of the improvement and he cannot be assessed to the full amount of such proportion if that exceed the statutory limitation. *Pike v. Cummings*, 36 O. S. 213.

A property owner's assessment will not be reduced because subsequent to the improvement part of the property was dedicated to the city for street purposes. *Wilson v. Cincinnati*, 5 N. P. 68.

**Determination of value.**—Where there is a large tract of land assessed and the assessment does not exceed the percentage limitation of the entire tract assessed, the assessment on any part is not invalid because as to such part if standing alone, the assessment would exceed the percentage of value allowable. *Schroder v. Overman*, 61 O. S. 1.

By present law value after improvement is made, governs. As to rule under former laws, see *Chamberlain v. Cleveland*, 34 O. S. 551.

**Sidewalks and sewers.**—The limitations of former sections on assessments were held to apply to sidewalks, (*Norwood v. Building Association*, 7 C. C. 95), and to sewers, (*Cincinnati v. Connor*, 55 O. S. 82). But, as to sewers, where a general plan has been adopted, see *Cincinnati v. Wewell*, 16 B. 287.

**Separate improvements.**—The present section requires that no assessment for any or all purposes exceeding thirty-three and one-half per cent of the actual value of the property assessed, shall be levied within the period of five years. This would seem to restrict the aggregate amount of assessments on any one piece of property within this period whether the improvements were on the same or a different street, and whether the improvements were of the same or a different character.

Former sections limiting amount of assessments within a given period, were not of this broad character. § 2271 R. S. (repealed) limited the amount of assessments that could be made "for any improvement." This was held to mean any one improvement and not to apply to two separate improvements such as a street improvement and a sidewalk improvement, neither of which exceeds the limitation but which together might exceed it. *Hunt v.*

Hunter, 11 C. C. 69; Cole v. Hunter, 5 N. P. 13; Cincinnati v. Fugman, 5 N. P. 14; Toledo v. Bank, 7 N. P. 330; Drake v. Cincinnati, 25 C. C. 373. § 2283 R. S. provided that the same territory "shall not be assessed for making two different streets or avenues." This was held to apply only to improvements on different streets, and not to separate and distinct improvements on the same street. Drake v. Cincinnati, 25 C. C. 373; but the limitation applied though the improvements on the different streets were not of the same character. Pretzinger v. Sunderland, 63 O. S. 132. These cases do not apply under the present section.

The aggregate of two assessments may exceed the limitation, if the owner has previously waived the limitation as to one of them by petitioning for the improvement or otherwise, and the other does not itself exceed the limitation. Punshon v. Cincinnati, 27 B. 155.

**Interest.**—If the interest on bonds issued for a street improvement, being included in an assessment, makes the same exceed the percentage of the value of the property allowed by law to be assessed, injunction will lie to prevent its collection. Salem v. Mulford, 22 C. C. 397 (affirmed without report, 62 O. S. 632).

Interest on deferred installments which increase the assessment beyond the statutory limitation will be enjoined. Bonds v. Salem, 10 C. D. 822; 20 C. C. 703.

**Excess only, void.**—The whole assessment is not void because it exceeds the limitation. The excess is merely not collectible and must be paid by municipality. Upington v. Oviatt, 24 O. S. 232.

**Second assessment only, invalid.**—Where there have been two assessments and the owner has paid the last in full it was held that he cannot resist the first because the two together have exceeded the limit, since the last only would be the defective one. Brooks v. Norwood, 12 C. C. 257.

**Estoppel to dispute excess.**—As to when owner is estopped by

petitioning for improvement or otherwise to resist such part of assessment as exceeds the limitation, see notes under §§ 61 and 62 of the Code.

(4) **Main sewers.**—As to what is a main sewer, see Cincinnati v. Standard Wagon Co., 1 N. P. 387.

**Limitation of assessment.**—Under former statutes it was said in Toledo v. Ry. Co., 4 C. C. 113, 128, "where a sewer has been constructed, whether the municipal corporation which constructed it has been divided into sewer districts or itself constitutes a sewer district; whether it is a main sewer, intended to furnish drainage for the whole territory lying within the district, or is a local sewer properly so-called—the power to levy special assessments to meet the cost and expenses of such an improvement is limited to what would be the fair cost of providing . . . 'an ordinary street sewer, or drain of sufficient capacity to drain or sewer such lots and lands.'"

(5) **Opinion of Council.**—Whether the opinion of council as to the size of sewer which will be of sufficient capacity to drain the lot could be overruled by the courts, *quere*. It certainly could not be overruled unless there has been gross abuse of discretion. Stanley v. Cincinnati, 13 Dec. 223.

(6) **Local drainage.**—By **municipal sewers.**—Under sections of a statute such as this property already provided with sewers constructed by the city are exempt from further sewer assessment. But to claim the exemption on the ground that the city has already provided a sewer it must be shown that the sewer already constructed by the city is one for the use of the property, amongst others, of the one claiming the exemption, that is, it must have been intended for and used for the drainage and accommodation of the lots abutting on the street in which it is constructed. Toledo v. Brown, 2 N. P. 45.

Thus, if the city sewer is merely for the purpose of draining a pond into a trunk sewer, but not to



accommodate lot owners, such owners cannot claim exemption from future assessment. *Toledo v. Brown*, 2 N. P. 45. And this is so even though such lot owners had secretly made connection with such sewer. *Id.*

So a sewer for surface drainage only, made before the street was improved to allow property owners to connect with a sewer temporarily on condition that they should pay when a regular sewer was built, is not local drainage that would exempt. *Cincinnati v. Honnigfort*, 32 B. 32. But in a case where property does not abut on the street in which the sewer is laid, but where non-abutting lot owners have the right to connect with such sewer, they will be held to be already provided with local drainage. *Miller v. Toledo*, 12 C. C. 706.

A sewer built by a city many years before, having no proper outlet, and not suited to the condition of the property at the later time, nor intended by the city even at the time as a part of its sewer system, but merely as a temporary expedient, will not be a provision for local drainage that will prevent assessment for a sewer suited to the needs of the time. *Avondale v. Scudder*, 12 C. C. 770. So where the sewer built by the city had no proper outlet, merely emptying on private property, and subject to be closed at any time, it does not satisfy the requirements as being a provision for local drainage and no exemption can be claimed thereby. *Wilson v. Cincinnati*, 5 N. P. 68.

The mere fact that an ordinance was passed by a municipality providing for sewer in front of property of the one claiming exemption, but which sewer was never constructed, would not exempt such property. *Cincinnati v. Bickett*, 26 O. S. 49.

**By private sewers.**—In order to give application to the exemption in the statute it is not necessary that the local drainage referred to should be provided by municipal authority. *Ford v. Toledo*, 64 O. S. 92, 98. But see *Johnson v. Avondale*, 1 C. C. 229, 232; *Wewell v. Cincinnati*, 45 O. S. 407. Thus, property though not supplied with a regular system of city sewerage, but which is completely drained by an extensive sewer constructed partly by the

city, and partly by individuals, was held to be exempt from further assessment. *Wewell v. Cincinnati*, 45 O. S. 407. So where a railway company had constructed a permanent and expensive brick sewer that completely drained its property it was held to be already provided with sewerage and thus exempt. *Toledo v. Railway Company*, 4 C. C. 113. So a tile sewer constructed by a property owner receiving and discharging all surface and other drainage into trunk sewer will be held to constitute sufficient local drainage. *Cincinnati v. Sullivan*, 8 N. P. 22.

But to claim exemption because of the construction of a private sewer it must be shown that the sewer or drain was of such dimensions, mode of construction, location, outlet, etc., as would belong to a sewer built by the municipality substantially in conformity to the requirements of the statute. *Toledo v. Railway Co.*, 4 C. C. 113, 131. So draining by a wooden box drain as a temporary expedient would not be sufficient. *Wewell v. Cincinnati*, 45 O. S. 407, 422. Property owners are not exempt merely because they made such private arrangements for draining their property as are satisfactory to themselves. *Johnson v. Avondale*, 1 C. C. 229, 232.

But if private sewer afford adequate drainage, the fact that municipality is constructing a new and better sewer, will not make property owner liable for assessment. *Lansmead v. Cincinnati*, 4 O. L. R. 135.

The "adequate local drainage," in order to give exemption from assessment, must be such as to include both permanency of structure and control. *Frey v. Millikin*, 15 Dec. 122; *Hildebrand v. Toledo*, 27 C. C. 427.

So, a connection by drain through another lot, with a sewer, where control might be lost by sale of lot, held not adequate local drainage. *Frey v. Millikin*, 15 Dec. 122.

**By natural sewer drainage.**—Lands and lots within a municipality which are naturally sufficiently drained are exempt from assessment for sewers. *Cincinnati v. Hess*, 19 C. C. 252.

But the fact that there is a permanent water course to which a lot reaches back and into which it is

drained, will not be sufficient to exempt it, for polluting such water course would be unlawful, even though the city is unlawfully emptying a sewer into such water course. *Cincinnati v. Kasselmann*, 23 B. 392; *Hildebrand v. Toledo*, 27 C. C. 427; 6 C. C. (N. S.) 450.

In order to exempt the property owner, the drainage claimed must be such as he has a right to make, and cannot be one that creates a nuisance. *Ib.* *Fred v. Millikin*, 15 Dec. 122; and the fact that a lot is provided with drainage at a point beyond the average depth of lots will not exempt it. *Ib.*

The fact that the house sewage of the house on the lot and the surface water from the lot are carried off, is not sufficient to support the contention of complete local drainage. The lot is not completely drained unless the water is also carried off that would naturally flow on to it from other lots above it, or in the neighborhood. *Stanley v. Cincinnati*, 13 Dec. 223; 1 N. P. (N. S.) 235.

**Surface drainage.**—The fact that land within a municipality is supplied with sufficient surface drainage is not enough to entitle it to claim "local drainage" within the purview of the statute. The drainage must be such as provides the land with adequate drainage for the necessary and useful purposes of sewerage. *Ford v. Toledo*, 64 O. S. 92.

**Unimproved property.**—The fact that the property is entirely unimproved and that there is no immediate need for drainage, will not exempt it from assessment for sewerage purposes. *Ford v. Toledo*, 64 O. S. 92.

**Land not subdivided,** if supplied with local drainage cannot be partly assessed for a sewer on the ground that if subdivided the part near sewer would not be supplied with independent drainage. *Knabe v. Cincinnati*, 49 B. 37.

**Proposed sewer not available,**—See note to § 87 of the Code, p. 254.

**How determined, generally.**—Whether a lot is already supplied with sufficient local drainage is a question more or less of opinion and is governed by no fixed standard. *Miller v. Cincinnati*, 18 C. C. 869. The question is to be determined by all the facts and circumstances

surrounding the property and existing at the time of assessing. *Cincinnati v. Hess*, 19 C. C. 252.

**Conclusiveness of council's determination.**—The decision of council as to what lots are already provided with local drainage will not conclude the court's inquiry into this question. *Toledo v. Railway Co.*, 4 C. C. 113.

**When provision applicable.**—The provision of former § 2380 R. S., repealed, exempting from assessment for sewer purposes lots or lands which are provided with local drainage, was held applicable to lateral as well as main sewers. *Stanley v. Cincinnati*, 13 Dec. 223; 1 N. P. (N. S.) 235. See also *Toledo v. Ry. Co.*, 4 C. C. 113. But see further *Ford v. Toledo*, 64 O. S. 92; *Hartwell v. Bldg. Ass'n*, 2 B. 287.

**Uniformity.**—A property owner is not exempt and cannot resist an assessment for sewerage purpose on the ground that other abutting property is not assessed because already provided with drainage. *Toledo v. Potter*, 19 C. C. 661.

Or because some lots have been partly exempted, because assessed for a reduced frontage, as authorized by statute. *Cleneay v. Norwood*, 14 O. F. D. 469; 2 O. L. R. 462.

**Enjoining assessment.**—Property being already provided with local drainage, the owner may enjoin assessment for the construction of a new sewer and need not wait until the assessment is actually levied. *Potter v. Norwood*, 21 C. C. 461.

(7) **Change of grade.**—Even if the grade is changed, the property cannot be assessed that part of the expense of the improvement which includes damages awarded to abutting owners for the change of grade. *McGlynn v. Toledo*, 22 C. C. 34 (affirmed, 47 B. 712).

Sec. 64 of the Code provides specially for case of change of grade. See that section and notes.

(8) **Bonds for municipality's portion of street improvement.**—The issuance of bonds not in anticipation of collection of special assessments, but to pay the municipality's portion of the cost of a street improvement, held not to be governed by the provisions of the "Longworth Bond Act." *Columbus v. Lazarus*, 15 Dec. 187.

*(b) Damages to abutting property.*

**Sec. 54.** [Claims for damages to be filed with clerk of council; effect of failure to so do.]<sup>1</sup> An owner<sup>2</sup> of a lot, or of land, bounding or abutting<sup>3</sup> upon a proposed improvement, claiming that he will sustain damages by reason of the improvement, shall, within two weeks after the service, or the completion of the publication of the notice mentioned in section 52, file a claim<sup>4</sup> in writing with the clerk of the council, setting forth the amount of the damages<sup>5</sup> claimed, together with a general description of the property with respect to which it is claimed the injury will accrue; an owner who fails to do so, shall be deemed to have waived the same, and shall be barred from filing a claim or receiving damages; and this provision shall apply to all damages which will obviously result from the improvement,<sup>6</sup> but shall not deprive the owner of his right to recover damages arising, without his fault, from the acts of the corporation, or its agents; provided, that if subsequent to the filing of such claim, the owner sells the property, or any part thereof, the assignee shall have the same right to damages which the owner would have had without the transfer. [1904, April 21, 97 v. 122.]

(1) **Old section.**—This is a substantial re-enactment of § 2315 R. S., repealed.

**Constitutionality.**—Old § 2315 R. S. held valid in *Cleveland v. Hyland*, 18 C. C. 868. See also *Reckner v. Warner*, 22 O. S. 275; *Cupp v. Commrs.*, 19 O. S. 173.

**Strict construction.**—This section barring right to damages when claim not filed, should be strictly construed. *East End B. & T. Co. v. Cleveland*, 1 N. P. (N. S.) 493; 14

Dec. 33, (aff'd, Cir. Ct. 49 B. 33).

(2) **Who may claim damages.**

—A mortgagee of property damaged has such an interest that he may claim damages for change of grade, and if he received no notice, may maintain action for such claim. *Savings Co. v. Cincinnati*, 12 Dec. 218.

(3) **Land not abutting on improvement.**—Old § 2315 R. S. was held not to apply to land abutting the street but not abutting pro-



posed improvement (an elevated viaduct) and the owner of such land need not file claim. *Cohen v. Cleveland*, 43 O. S. 190. But municipality may be liable though land does not abut immediately upon the improvement. *Keating v. Cincinnati*, 38 O. S. 141.

When improvement touches but one corner of lot, section held not to apply. *Miller v. Cincinnati*, 2 B. 156. On question of lands abutting improvement, see also *R. R. Co. v. McLaughlin*, 15 C. C. 1; *Jackson v. Jackson*, 16 O. S. 163; *Birtwhistle v. Cincinnati*, 8 B. 25; *Eagle White Lead Co. v. Cincinnati*, 1 C. S. C. R. 154.

(4) **Failure to file claim** is an absolute bar to recovery in all cases where statute applies. *Hickox v. Cleveland*, 8 O. 543; *Cohen v. Cleveland*, 43 O. S. 190; *R. R. v. Defiance*, 52 O. S. 262; *Cleveland v. Hyland*, 18 C. C. 868; *Taber v. Bowling Green*, 28 C. C. 173; 7 C. C. (N. S.) 385.

A verbal claim is insufficient where statute requires that it shall be in writing. *Anderson v. McKinney et al.*, 24 O. S. 467.

(5) **Recovery limited to amount claimed.**—See *Cleveland v. Hyland*, 18 C. C. 868. But if property owner is deceived by statements of city engineer as to character of proposed improvement, the plans and profiles being unintelligible, and makes a compromise of his claim this will not bar a further recovery. *Property Owner v. Akron*, 7 N. P. 454.

**Claim cannot be increased** after time for filing has expired. See *Geib v. Cleveland*, 7 N. P. 301.

**When filing claim unnecessary.**—In case of improvements which are not to be paid for in whole or in part by special assessments, no claim for damages need be filed to entitle property owner to recover. *East End B. & T. Co. v. Cleveland*, 1 N. P. (N. S.) 493; 14 Dec. 33, (aff'd, Cir. Ct. 49 B. 33); and see note 2, under § 51 *supra*. But claims for damages may be filed in such case at property owner's option. *East End B. & T. Co. v. Cleveland*, 1 N. P. (N. S.) 493; 14 Dec. 33, (aff'd, Cir. Ct. 49 B. 33).

An abutting property owner to whom no notice of proposed improvement was given need not file claim under this section. *Jacobs v. Cincinnati*, 2 N. P. 283; *Toledo v. McMahon*, 9 C. C. 194; *McGee v. Avondale*, 7 C. C. 246. As to sufficiency of notice, see *Fenner v. Cincinnati*, 4 N. P. 182. Where municipality makes one a party to suit to assess compensation his failure to file claim is waived. *Cincinnati v. Sherike*, 47 O. S. 217. Where property owner has been misinformed by city engineer as to change of grade and thus led not to file a claim, his failure will not prevent recovery. *Youngstown v. Moore*, 30 O. S. 133. As to necessity for filing claim under § 2326 R. S., re-enacted in § 94 of the Code, see notes thereto. If notice is not sufficient to inform property owner with reasonable certainty of the effect of proposed improvement upon his lands he is not barred from recovering damages sustained by failure to file claim. *Cincinnati v. Corry*, 23 B. 359.

(6) **Basis of recovery.**—The basis of the recovery of damages is that the abutting owner has been misled by the municipality to his prejudice. Right of access to and from the street is property, and where an owner has improved his lot, relying upon a previously established grade or upon a reasonable grade thereafter to be established, and the municipality changes the established grade or establishes an unreasonable grade, in either case so as to injuriously affect the access of the abutting owner, he is entitled to recover the damages thereby sustained, for it is not just that he should bear the whole loss. *Goodloe v. Cincinnati*, 4 O. 500; *Smith v. Cincinnati*, 4 O. 514; *Le Clercq v. Gallipolis*, 7 O. 218; *Hickox v. Cleveland*, 8 O. 543; *Rhodes v. Cleveland*, 10 O. 159; *Bingham v. Doane*, 9 O. 165; *Akron v. McComb*, 18 O. 229; *Crawford v. Delaware*, 7 O. S. 459; *Cincinnati v. Penny*, 21 O. S. 499; *Akron v. Chamberlain*, 34 O. S. 328; *Ryan v. Cinti*, 1 C. C. 558; *Cincinnati v. Weber*, 23 C. C. 651; 3 C. C. (N. S.) 56; *East End B. & T. Co. v. Cleveland*, 1 N. P.

(N. S.) 493; 14 Dec. 33, (aff'd, Cir. Ct. 49 B. 33).

Owner cannot enjoin improvement until damages have been paid or secured. *East End B. & T. Co. v. Cleveland*, 1 N. P. (N. S.) 493; 14 Dec. 33, (aff'd, Cir. Ct. 49 B. 33).

#### **Change of existing grade.—**

Municipality is liable where abutting owner has improved his lot with reference to an existing grade and the grade is subsequently changed to his damage. *Akron v. Chamberlain*, 34 O. S. 328, and other cases cited above. Where grade that is changed is that of an old highway adopted and used as a street, municipality is liable for damages to improvements made with reference to the old grade. *Youngstown v. Moore*, 30 O. S. 133; but change in the grade of a canal tow-path gives no cause of action. *Chatfield v. Cincinnati*, 1 B. 125. Where turnpike grades are changed after becoming city streets, owners of abutting property damaged may recover. *Cincinnati v. Williams*, 10 Rec. 705.

An existing grade need not have been established by ordinance to justify property owners in improving it; its establishment may be shown by nature of surface improvement by municipality, provided same is not merely temporary. *Akron v. Chamberlain*, 34 O. S. 328, 336. Whether municipality has by use adopted a surface grade is a question for the jury. *Chatfield v. Cincinnati*, 1 B. 125. Improvements for temporary convenience do not indicate establishment of grade. *McGee v. Avondale*, 31 B. 163. Laying of sewers and sidewalks in an unimproved street does not establish a grade. *Neubert v. Toledo*, 9 C. C. 462. Long user may estab-

lish the grade of the traveled portion only of a street, and where improvements are made with reference to grade immediately in front of owner's premises city cannot be held for damages by changing the grade of the whole street. *Cincinnati v. Roth*, 20 C. C. 317; and the grade of the traveled and improved portion of a roadway determines the grade for the entire width. *Ib.*

After municipality has established grade it must proceed with improvement within reasonable time, and when this is not done a property owner building with reference to old grade, but after establishment of new, may recover damages. *Nolte v. Cincinnati*, 3 C. C. 503. And where city fails for six months to pay damages awarded for change of grade, it will be held to have abandoned the improvement. *Toledo v. Jacobson*, 11 C. C. 220. Where an agreement of annexation of a village to a city, provided that grades of the village streets should not be changed without consent of, and compensation to, the owners of abutting property, it was held that such agreement merely secured to such owners the same rights as if such streets had been established by the city. *Thale v. Cincinnati*, 1 N. P. 427. Municipality cannot bind itself by agreement not to change the grade of a street. *Ib.* See also *Gas Light and Coke Co. v. Columbus*, 50 O. S. 65; *Corry v. Cincinnati*, 22 B. 194. As to effect of consent of property owner to change of grade see *Feuerstein v. Jackson*, 8 C. C. 396.

**Establishment of unreasonable grade.—**Municipality is liable where abutting owner improves before any grade is established and subsequently an unreasonable grade

is made. *Akron v. Chamberlain*, 34 O. S. 328; but owner in improving must anticipate a reasonable grade. *Id.* But where owner makes improvements after a grade has been established but before the street is built to conform to it, he cannot recover, even though such grade is unreasonable. *Cincinnati v. Weber*, 23 C. C. 651; 3 C. C. (N. S.) 56.

When no grade has been established by ordinance or user, property owner is not entitled to damages when grade is established, unless it is an unreasonable grade. *Ross v. Cincinnati*, 24 C. C. 43; 2 C. C. (N. S. 594 (affirmed, 67 O. S. 521); *Taber v. Bowling Green*, 28 C. C. 173; 7 C. C. (N. S.) 385.

**What is a reasonable grade.**—Establishment by municipality is not conclusive of reasonableness. *Pitton v. Cincinnati*, 3 C. C. 593. Reasonableness of grade is a question for the jury. *Id.* Reasonableness of grade cannot be shown by opinion of a witness, but jury must determine this from facts put in evidence. *Feuerstein v. Jackson*, 8 C. C. 396, 399.

**Owner of unimproved lot** cannot recover damages for change of grade, being presumed to purchase with a view to a reasonable improvement of the street. *Crawford v. Delaware*, 7 O. S. 459; *Leonard v. Cassidy*, 8 C. C. 529.

**What is an improved lot.**—Buildings constitute improvement, and damages to them are recoverable. *Crawford v. Delaware*, 7 O. S. 459; *Akron v. Chamberlain*, 34 O. S. 328; *Keating v. Cincinnati*, 38 O. S. 141.

Grading to an established grade is an improvement, and when the change destroys the value of such grading the same may be recovered, not exceeding in amount the value of the lot. *Seasongood v. Cincinnati*, 5 C. C. 225; *affd.*, 51 O. S. 611. Upon same principle the building of fences and walls and the planting of trees, hedges and shrubbery are improvements. *Cincinnati*

*v. Williams*, 10 Rec. 705; so is a sidewalk. *Kellner v. Dayton*, 1 Dayton, 28.

**Measure of damages.**—The owner is entitled to that sum which represents the diminution in value of his property caused by change of grade or the establishment of an unreasonable grade. General benefits derived from the improvement cannot be offset, though special and local benefits not such as are conferred upon other abutting property may be so offset. *Martin v. Bond Hill*, 7 C. C. 271; *Cincinnati v. Williams*, 10 Rec. 705; *R. R. Co. v. Gardner*, 45 O. S. 309, 323; *Carlisle v. Cincinnati*, 8 C. C. (N. S.) 46. The measure of damages is the difference in value of the property as a whole, and the owner cannot recover for injury to trade or business or extra expense connected therewith, caused by the change of grade. *Cincinnati v. Whetstone*, 12 B. 247. Property owner cannot recover for unsightliness of his premises or obstruction of view caused by the improvement. *Cincinnati v. Williams*, 10 Rec. 705. Recovery is limited to diminution in value of the improvements on owner's property. *Id.*; and where buildings are just as conveniently located with respect to new grade as they were with respect to old he cannot recover. *Lotze v. Cincinnati*, 61 O. S. 272. On measure of damages, see also *R. R. Co. v. Martin*, 10 W. L. J. 54; *Chatfield v. Cincinnati*, 1 B. 125; *White v. Cincinnati*, 47 B. 169, *edit.*

**When damages payable.**—The property owner is entitled to compensation before the improvement is made. *Ryan v. Cincinnati*, 1 C. C. 558; *Crawford v. Delaware*, 7 O. S. 459; *Ry. Co. v. Cummins*, 14 O. S. 523.

**Property owner entitled to interest** on award of damages from time change of grade is made. *Cincinnati v. Whetstone*, 47



O. S. 196; and this is from the time the work is begun. *Cincinnati v. Williams*, 9 B. 243. When interest alone not paid, separate action may be brought for it. *Toledo v. Scott*, 23 B. 238.

**Street acquired by dedication or appropriation** may be improved to a reasonable grade without liability to abutting owner for any injury resulting therefrom, including the removal of lateral support, all such damages being considered waived by dedication or included in the award. *Grant v. Village of Hyde Park*, 47 B. 831, 67 O. S. 166; *Tenney v. Cincinnati*, 47 B. 832; 24 C. C. 237; 67 O. S. 518; *Ross v. Cincinnati*, 24 C. C. 43; 2 C. C. (N. S.) 594, (affirmed, 67 O. S. 521). But see *contra*, *Harlow v. City, Cin. Court Index*, June 9, 1902; *Columbus v. Williard*, 7 C. C. 113.

**Damages cannot be included in assessment.**—See *McGlynn et al. v. Toledo*, 22 C. C. 34 (affd. 47 B. 712; *Carlisle v. Cincinnati*, 8 C. C. (N. S.) 46; see note (1) under § 2284, p. 262.

**Enjoining public improvement.**—When proposed change of grade threatens injury to private property and ultimate relief is compensation, court may refuse injunction and retain case for assessment of damages. *Turnpike Co. v. Commrs.*, 5 N. P. 423.

Injunction refused against city's proceeding with improvement where damages for change of grade have been paid, but plaintiff has not been paid for sloping fill. *Fogarty v. Cincinnati*, 7 N. P. 100.

Property owner to whom jury in change of grade case allowed no damage must seek remedy in error proceedings; he cannot enjoin the

improvement. *Frevert v. Finfrock*, 31 O. S. 621.

Property owner showing threatened injury may enjoin when authority to fix the new grade has been unlawfully delegated by council to city engineer. *Lippleman v. Cincinnati*, 4 C. C. 327.

The owner of an unimproved lot cannot prevent by injunction a change of grade in front of his property, but he may enjoin the taking of a portion of his land for the construction of a viaduct where compensation has not first been paid. *Leonard v. Cassidy*, 8 C. C. 529.

The construction of approaches to a county bridge which will change the grade in front of plaintiff's improved property may be enjoined until compensation is paid. *Gawn v. Wilson*, 7 N. P. 33.

**Pleading, practice and evidence.**—Municipality is bound by its plans and specifications and cannot show by its officers that the proposed improvement will be made in some different manner. *Martin v. Bond Hill*, 7 C. C. 271; nor can municipality show by its officers that a grade will be established according to law where an improvement is proceeding without required action of the authorities. *Feuerstein v. Jackson*, 8 C. C. 396, 399.

Damages may be proven by testimony either showing the value of the property immediately before and immediately after the improvement, or showing the cost of adjusting the property to the new grade by cutting down, filling, restoring or repairing buildings, fences, etc. But opinion of witness that property is damaged or stating the amount of the damage

is not admissible. *R. R. Co. v. Ball*, 5 O. S. 568.

Testimony tending to show that property will be benefited by the change of grade, when no special or local benefit different from that conferred upon other property abutting the improvement is claimed, is not admissible. *Martin v. Bond Hill*, 7 C. C. 271; *R. R. Co. v. Gardner*, 45 O. S. 309, 323. But special benefits, peculiar to the particular property, may be shown. *Lotze v. Cincinnati*, 61 O. S. 272. Property owner's remedy, if no damages are allowed, is by proceedings in error. See § 57 of the Code; and see also *Frevert v. Finfrock*, 31 O. S. 621. He cannot enjoin the improvement. *Id.*

Where the record does not show what the answer to the question would have been, an exception is not properly taken to a refusal of the court to allow witnesses to testify to the reasonableness or unreasonableness of a grade. *Cincinnati v. Weber*, 23 C. C. 651. In a suit to contest an assessment plaintiff cannot show damages to the property assessed as set-off against the assessment. *Ulm v. Cincinnati*, 7 N. P. 278; *Strauss v. City*, 23 B. 359. But in a suit by property owner for damages for change of grade municipality may offset unpaid assessment for such improve-

ment, though such assessment could not under later decisions include the damages awarded. *Toledo v. Breyman*, 23 B. 242. In suit by taxpayer to enjoin a change of grade on ground that action proposed is unreasonable and an abuse of corporate power it is not sufficient to show that the old grade had been long established and improved to by private owners and public authorities. *Corry v. Cincinnati*, 22 B. 194.

A city engineer's book levels are not admissible to show a grade established by ordinance, but may be introduced to prove levels as taken. *Incl. Plane R. R. Co. v. Pfan*, 9 B. 200.

A petition for damages for change of grade, filed after the change is made, and not alleging that the same was done contrary to law, is demurrable. *Kratochwill v. West Carrollton*, 1 Dayton 35.

NOTE.—For a full discussion of the principles involved in change of grade cases, including the right of recovery and the measure of damages, see article in 10 *Am. Law Rec.* 705, by Mr. Frank M. Coppock, of the Cincinnati bar.

**Other causes of action.**—For cases involving injuries to property by the making of street improvements, and not affected by this section, see notes to § 28 of the Code.

#### FORM OF CLAIM FOR DAMAGES.

....., 19...

To the Clerk of the Council of the City [or Village] of.....,  
State of Ohio:

The undersigned is the owner of the following described property in the city [or village] of.....: (here insert general description of property), bounding and abutting upon.....street, between..... and.....(state termini of proposed improvement).

And claims that said property will be damaged in the sum of.....dollars by the proposed improvement of.....street under the resolution passed therefor on the.....day of....., 19....

.....

**Sec. 55.** [Determination of council to proceed with improvement, and time for inquiring into claims for damages.]<sup>1</sup> At the expiration of the time limited for filing claims for damages, as provided for in the last section, the council shall determine whether it will proceed with the proposed improvement or not, and whether the claims for damages filed as aforesaid shall be judicially inquired into, as hereinafter provided, before commencing, or after the completion<sup>2</sup> of the proposed improvement; and if it decides to proceed therewith, an ordinance for the purpose shall be passed;<sup>3</sup> said ordinance shall set forth specifically the lots and lands to be assessed for the improvements;<sup>4</sup> shall contain a statement of the general nature of the improvement and the character of the materials which may be bid upon therefor; of the mode of payment therefor; a reference to the resolution theretofore passed for said improvement, giving the date of its passage and a statement of the intention of council to proceed therewith in accordance with said resolution and in accordance with the plans, specifications, estimates and profiles provided for said improvement.<sup>5</sup>

[How lots and lands to be described.] In setting forth specifically the lots and lands abutting upon the improvement and to be assessed therefor, it shall be sufficient to describe them as all the lots and lands bounding and abutting upon said improvement between and including the termini of the improvement, and in describing those which do not so abut it shall be sufficient to describe the lots by their appropriate lot numbers, and the lands by metes and bounds; and this rule of description shall apply in all proceedings in which lots or lands are to be charged with a special assessment. [1904, April 21, 97 v. 122.]

(1) **Old section** 2316 R. S. repealed.

(2) **Constitutionality.** — The provision allowing the inquiry into

damages to be postponed until after the improvement is made is constitutional. *Toledo v. Preston*, 50 O. S. 361.



(3) **Effect of ordinance** as to binding municipality, see *Shehan v. Cincinnati*, 25 B. 212 (aff'd, 27 B. 375), and see *Hays v. Cincinnati*, 62 O. S. 116, 122.

(4) **Sufficiency of description.**—Ordinance need not fix the depth of lots subdivided. *Wilson v. Cincinnati*, 5 N. P. 68. Ordinance may describe lots and lands by referring to a resolution describing them. *Id.*

(5) **Requirements of ordinance.**—An ordinance not specifically ordering cost to be assessed on abutting property, but incorporating by reference the preceding resolution, which did so order cost to be paid, was held to fulfill the requirements. *Cincinnati v. Goodman*, 5 Rec. 153.

So an ordinance not mentioning drains and culverts, but referring to the resolution which did provide for them, was held to have sufficiently

ordered drains and culverts. *Schroeder v. Overman*, 18 C. C. 385; 61 O. S. 1.

Statement in an ordinance providing for improvement of a street, that the paving shall be asphalt, brick or other material as may thereafter be determined, meets the requirement that the ordinance shall contain a statement of the general nature of the improvement and the character of the materials which may be bid upon therefor. *Emmert v. Elyria*, 74 O. S.—, (51 B. 189).

The intention of the legislature was to require council to designate, not the particular material with which the street should be paved, but to state the general character of the same. *Scott v. Hamilton*, 7 C. C. (N. S.) 493.

See Code § 60.

## FORM OF ORDINANCE TO PROCEED WITH THE IMPROVEMENT.

Ordinance No. ....

Determining to proceed with the improvement of.....street, from .....to....., by paving [constructing sewer or making other improvement].

Be it ordained by the council of the city [or village] of....., State of Ohio, three-fourths of all members elected thereto concurring:

Sec. 1. That it is hereby determined to proceed with the improvement of.....street, from.....to....., by.....(here insert general nature of improvement and character of materials to be used), in accordance with Resolution No....., passed on the.....day of ....., 19...., and in accordance with the plans, specifications, estimates and profiles heretofore approved and now on file in the office of the department of public service [or, in villages, of the clerk].

Sec. 2. That all claims for damages resulting therefrom shall be judicially inquired into before commencing [or after the completion] of the proposed improvement, and the solicitor [or mayor] be and he is hereby authorized and directed to institute proceedings in a court of competent jurisdiction to inquire into such claims (if the same are to be inquired into before commencing the improvement).

Sec. 3. (Here repeat mode of payment for the improvement, and whether or not bonds are to be issued in anticipation of the collection of assessments, as determined in improvement resolution. See form under § 51 of the Code.)

Sec. 4. That the following lots and lands shall be assessed for said improvement as above determined: All the lots and lands bounding and abutting upon said improvement on .....street between..... and ..... (designating specifically the termini of the improvement). [Or, if some lots or lands do not abut upon the improvement, such lots may be described by their appropriate lot numbers, and lands by metes and bounds.]

Sec. 5. (*In cities.*) That the board of public service be and hereby is authorized and directed to make and execute a contract for said improve-

ment with the lowest and best bidder after advertisement, according to law.

Sec. 5. (*In villages.*) That the clerk be and he is hereby authorized and directed to advertise for bids for the construction of said improvement according to law.

Sec. 6. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed....., 19...

Attest.

.....  
Clerk.

.....  
President of Council.

(In view of the provisions of § 61 of the Code, it seems advisable that the above ordinance should be passed by a three-fourths vote of council, though this is not explicitly required, as in case of resolution of necessity.)

#### FORM OF ASSESSING ORDINANCE.

Ordinance No.....

To levy special assessments for the improvement of.....street from.....to....., by (here describe character of improvement.)

Be it ordained by the council of the city [or village] of....., State of Ohio:

Sec. 1. That to pay the portion of the cost and expenses heretofore determined to be specially assessed for the improvement of.....street, from.....to....., by (here describe character of improvement) there be levied and assessed upon the lots and lands hereinafter described, the several amounts herein set forth, viz.:

[*or in assessments by benefits upon report of estimating board:* "Be it ordained by the council of the city [or village] of....., State of Ohio: Sec. 1. That the assessment of the cost and expenses of improving.....street, from.....to....., by" (here describe character of improvement), "as reported to council on the.....day of....., 19..., by the board heretofore appointed to estimate said assessment, be and the same is hereby adopted, and that there be levied," etc.]

[*or in assessments by benefits upon report of equalizing board:* "Be it ordained by the council of the city [or village] of....., State of Ohio, two-thirds of all members concurring: Sec. 1. That the assessment of the cost and expenses of improving.....street, from.....to....., by" (here describe character of improvement) "as reported to council on the.....day of....., 19..., by the board heretofore appointed to hear all objections to, and to equalize, said assessments, be and the same is hereby confirmed, and that there be levied," etc.]

| Owner. | Description of property. | Assessment. |        |
|--------|--------------------------|-------------|--------|
|        |                          | Dollars.    | Cents. |
|        |                          |             |        |

Which assessments are.....per cent. of the tax value of the property assessed [*or*, ".....dollars and.....cents per front foot of the property assessed," *or*, "are in proportion to the benefits accruing to the property assessed"].

Sec. 2. That the total assessment against each lot shall be payable in cash within.....days of the date of the final passage of this ordinance, or in.....annual installments with interest at the rate of..... per cent, per annum upon deferred payments, at the option of the owner. All cash payments shall be made to the city [*or village*] treasurer. All installments of assessments shall be certified by the clerk of the council to the county auditor on or before the second Monday in September, annually, to be by him placed upon the tax duplicate and collected as other taxes are collected.

Sec. 3. That to provide a fund for the payment of the portion of the cost and expense for which the special assessments herein are levied for the improvement of.....street as aforesaid, the mayor and auditor [*or in villages*, clerk] be and they are hereby authorized to issue bonds of the city [*or village*] of.....in the aggregate sum of.....dollars, payable at....., of which bonds,.....bond..in the sum of .....dollars, shall be payable on the.....day of....., 19..., (here insert amount to be received and date when first installments of assessments will be received by the city or village treasurer) and..... bond..in the total sum of.....dollars, payable one year after said last mentioned date, (and so on in accordance with the number of installments or assessments) with interest on said bonds at the rate of..... per cent, per annum, payable annually (or otherwise), said bonds to be signed by the aforesaid officers, and sold by them as provided by law, and the proceeds thereof shall be applied to the payment of the cost and expense of said improvement as aforesaid, and to no other purpose whatsoever; and for the payment of the said bonds, and the interest thereon, the revenue and faith and all the real and personal property of the city [*or village*] are hereby pledged; provided, that if within the time above specified and before the sale of the said bonds any of the owners of said property shall pay their total assessments in cash, the aggregate sum in bonds to be issued shall be reduced by deducting the amount so paid in cash from the total amount of the fund to be provided, and the bonds issued shall be severally reduced in amounts proportionately.

Sec. 4. That upon the sale of said bonds the proceeds thereof, together



with the moneys received, if any, from the cash payments of assessments, shall be placed in the city [or village] treasury, and disbursed upon proper vouchers in payment of the cost and expense of the improvement aforesaid.

Sec. 5. That the said annual assessments, and all portions thereof, shall be applied to the payment of said bonds and the interest thereon as the same shall become due, and to no other purpose whatsoever.

Sec. 6. That this ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed....., 19...

Attest:

.....

Clerk.

.....

President of Council.

NOTE.—Bonds in anticipation of the collection of assessments must be issued and sold in the manner provided in §§ 95, 96 and 97 of the Code. When sold to the sinking fund trustees, a single manuscript bond for the entire amount of deferred installments of assessments may be issued, and such installments and interest, as received, applied thereon. § 94 of the Code requires that such installments shall be certified by the clerk of council to the county auditor annually and collected as other taxes. In cities, this may be done by the city auditor delivering a record of such installments to the clerk of council and the latter certifying them to the county auditor.

**Sec. 56. [Assessment of damages.]**<sup>1</sup> When claims for damages are filed within the time limited, and the council, having passed an ordinance for making the improvement, determines that the damages shall be assessed before commencing it, the mayor or solicitor shall make a written application for a jury, to the Court of Common Pleas, or a judge thereof in vacation, or to the Probate Court<sup>2</sup> of the county in which the corporation, or the larger part of it, is situated; and the court or judge shall direct the summoning of a jury, in the manner provided for the appropriation of property,<sup>3</sup> and fix the time and place for the inquiry, and the assessment of such damages, which inquiry and assessment shall be confined to the claims as aforesaid.<sup>4</sup>

(1) **Old section** 2317 R. S., repealed.

(2) **Jurisdiction of Probate Court.**—No constitutional objection to conferring on probate court juris-

diction to inquire by jury into claims for damages. Toledo v. Preston, 50 O. S. 361.

(3) **Procedure.**—See note (3) to § 15 of the Code, page 91.

See further as to proceedings of jury, § 2318 R. S., re-enacted in § 94 of the Code, *infra*.

As to assessment of damages *after* completion of improvement, see § 2321 R. S., re-enacted in § 94 of the Code, *infra*.

(4) **Damages assessed before commencing improvement** must be paid to property owner before work is begun in front of his property, *Ryan v. Cincinnati*, 1 C. C. 558; interest must be paid on amount if compensation is deferred, *Cincinnati v. Williams*, 9 B. 243; and where the owner sues for damages the corporation having failed to have damages assessed, owner is entitled to interest from the time the work was begun, *Cincinnati v. Whetstone*, 47 O. 9. 196.

**Failure to pay award.**—Where

municipality fails to pay award of damages and to enter upon improvement it shall be held to have abandoned the improvement and property owners who were defendants in the action to assess damages may have costs and attorney fees allowed as in case where city fails to pay for or take possession of property after appropriation proceedings. *Toledo v. Jacobson*, 11 C. C. 220 (dismissed, 38 B. 248).

**Estoppel to deny filing of claim.**—Where municipality has made a property owner defendant in an action to assess damages and submitted his claim to a jury, it cannot defeat his recovery by showing that he did not file his claim in time. *Cincinnati v. Sherike*, 47 O. S. 217.

#### FORM OF APPLICATION TO ASSESS DAMAGES.

.....Court,.....County, Ohio.

The City [or Village] of

.....,

Plaintiff,

v.

(Here insert names of all persons who have filed claims within time required by law),

Defendants.

Application to assess damages.

Now comes the city [or village] of.....and represents that it is a city [or village] under the laws of Ohio, and that its council by resolution duly passed on the.....day of....., 19..., declared it to be necessary to improve.....street, from.....to....., by..... (here describe nature of proposed improvement).

And that notice of the passage of said resolution was given according to law, to all persons whose property is to be assessed to pay any portion of the cost of said improvement.

Plaintiff further represents that on the.....day of....., 19..., its council determined by ordinance duly passed to proceed with the proposed improvement and that claims for damages should be judicially inquired into, before commencing said improvement and directed the solicitor [or mayor] to make this application.

Plaintiff further represents that the following named persons, defendants herein, filed claims in writing, on the dates hereinafter shown, with the clerk of council, setting forth the damages claimed to be sustained by reason of said improvement, as follows:

1. ...., claiming to be the owner of..... (here describe property as set forth in claim for damages), filed a claim on the..... day of....., 19..., as follows: (here insert claim).

2. ...., etc., etc.

Wherefore, plaintiff asks the court to cause a jury to be impaneled to make inquiry into and assess the damages, if any, which will be sustained by defendants' lots and lands, by reason of the proposed improvement, as provided in said resolution and ordinances.

.....

Solicitor [or Mayor].

(No verification required.)

#### PRECIPE.

To the Clerk:

Issue notice to the defendants named in the above application that plaintiff will, on the.....day of....., 19..., at....M., apply to the Honorable....., judge of the.....Court of..... county, for the impaneling of a jury to make inquiry into and assess, the damages, if any, to be paid by the city [or village] of.....to the persons having filed claims therefor according to law, under the ordinance to improve.....street, from.....to....., passed on the .....day of....., 19....

.....

Solicitor [or Mayor].

#### FORM OF VERDICT.

The City [or Village] of

.....,

Plaintiff,

v.

(Here insert names of all property owners parties to the proceeding).

Defendants.

} Verdict.

We, the jury in this cause, duly impaneled and sworn, do assess to the several parties defendant herein, as the actual damages which will be sustained by their lots and lands, as set forth in the application herein, by reason of the improvement of.....street, as provided in the resolution and ordinances described in said application as follows:

1. To.....the sum of.....dollars.

2. To.....the sum of.....dollars.

Etc., etc.

[Signed by all jurors.]



## FORM OF JUDGMENT.

|                                                                                                                                                                                                                                      |   |           |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---|-----------|
| The City [or Village] of<br>.....<br><div style="text-align: right;">Plaintiff.</div> <div style="text-align: center;">v.</div> (Here insert names as in form of ver-<br>dict),<br><div style="text-align: right;">Defendants.</div> | } | Judgment. |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---|-----------|

This cause coming on to be heard upon the verdict of the jury heretofore rendered, assessing to the several parties defendant herein, as the actual damages which will be sustained by their lots and lands by the improvement of.....street, as provided in the resolution and ordinance described in the application herein, as follows:

1. To.....the sum of.....dollars.

2. To.....the sum of.....dollars.

Etc., etc. (Repeat names and amounts shown in verdict.)

It is considered and adjudged by the court that the several parties defendant aforesaid recover of the plaintiff herein, the city [or village] of....., at or before the commencement of said improvement in front of their said lots and lands, the sums of money severally assessed to them in said verdict, as above set forth, and that the plaintiff pay the costs of this proceeding, taxed at.....dollars.

**Sec. 57. [Prosecution of error.]** The provisions of section 21 of this act shall apply to the municipal corporation, or the owners of any property who may desire to prosecute error as in other cases.<sup>1</sup>

(1) See notes to § 21 of the Code, page 100.

**Sec. 58. [Costs of inquiry.]**<sup>1</sup> In cases where the jury finds no damages, the costs of the inquiry shall be taxed against the claimant, and collected on execution, and in all other cases the costs<sup>2</sup> shall be paid by the corporation.

(1) **Old section** 2320 R. S., repealed.

(2) **On failure to pay award** or take possession within six months, the costs which must be paid to property owner, include at-

torney's fees. *Toledo v. Jacobson*, 11 C. C. 220.

**Owner not allowed damages** cannot enjoin improvement. He must seek his remedy by error proceedings. *Frevert v. Finrock*, 31 O. S. 621.

*(c) Improvement Contracts.*

**Sec. 59. [How contract to be let.]**<sup>1</sup> The contract for any such improvement shall be let under the provisions of sections 143 and 144 of this act, and in case all bids be rejected the directors of public service in cities and the council in villages may order a re-advertisement for bids.<sup>2</sup>

(1) **Old section.**—See old § 2303 R. S., repealed, for former provision as to contracts for improvements.

(2) **Advertisement for bids.**—An advertisement for bids which gave no information about the work except by referring to plans and specifications, which were not made till within less than time required for advertising before making bids, was held not valid. *Steese v. Oviatt*, 24 O. S. 248, 252.

The requirement of proper advertisement is designed to protect the

taxpayers and is peremptory and without it contract and assessment are invalid. *Upington v. Oviatt*, 24 O. S. 232.

As to what defects in advertising are covered by a curative act curing technical irregularities, see *Wilder v. Cincinnati*, 26 O. S. 284, 285; *Cincinnati v. Goodman*, 5 Rec. 153; *Burgett v. Norris*, 25 O. S. 308; *Taylor v. Wapakoneta*, 26 C. C. 285.

**Forms.**—For forms of advertisement, bid, etc., in letting of contracts, see § 143 of the Code.

**Sec. 60. [When certain assessments shall be deemed valid and binding.]** This act shall be subject to the provisions of section 211 of the act of which this is amendatory.

In any case in which special assessments have been, or may hereafter be made, upon property for the construction of any improvement, and several kinds of material have been named in the ordinance, or ordinances, providing for the same, and on which bids have been received for the construction of said improvements with any or all of said materials, said assessments shall be valid and binding assessments upon the property so assessed. In the case of construction of sewers hereafter, excepting main or district sewers, notice of the passage of the resolution therefor, as provided in section 84 of the act of which this is amendatory shall be made in the manner provided in section 52 of said act as amended herein. [1904, April 21, 97 v. 123.]

*(d) Improvements on Petition.*

**Sec. 61.** [When council authorized to proceed with improvement without concurrence of three-fourths of council.]<sup>1</sup> No public improvement, the cost or part of cost of which is to be specially assessed on the owners of property, shall be made without the concurrence of three-fourths of the whole number of the members elected to council, unless the owners of a majority of the foot frontage to be assessed, petition in writing therefor, in which event the council shall be authorized (a majority of the whole number elected thereto concurring), to proceed with the improvement in the manner herein provided.<sup>2</sup>

(1) **Old section** 2267 R. S. (repealed.) § 2267, amended, 95 O. L. 35 (repealed.)

(2) **How majority determined.**—For cases as to determining the majority in petitions for highway improvements, see *Burgett v. Norris*, 25 O. S. 308; *Campbell v. Park*, 32 O. S. 544; *Parker v. Burgett*, 29 O. S. 513.

The owner of a corner lot signing for the full length of his side-wise frontage will not be counted for that frontage as against his co-petitioners in determining the majority, although he himself may be estopped. *Andrew v. Auditor*, 5 N. P. 123.

A city cannot be counted as a petitioner because of the fact that an ordinance for the improvement has been passed. *Tone v. Columbus*, 1 C. C. 305.

**Verbal declaration** in favor of improvement will not be equivalent to signing petition. *Tone v. Columbus*, 1 C. C. 305.

**Collateral attack.**—The finding that the requisite number petitioned for the improvement is not con-

clusive of the fact. *Corry v. Gaylor*, 22 O. S. 584; *Stephan v. Daniels*, 27 O. S. 527; *Hayes v. Jones*, 27 O. S. 218; *Lima v. McBride*, 34 O. S. 338; *Anderson v. Commissioners*, 12 O. S. 635.

**Names on separate papers.**—Though the names are signed on separate papers, yet if together they constitute the requisite majority, the petition will be sufficient, *Braden v. Commissioners*, 31 O. S. 386; and petitioners for the same improvement signing on another paper but asking to be counted as petitioners will be so counted, *Commissioners v. Young*, 36 O. S. 288; where two petitions ask for practically the same improvement they will be counted together to make up the requisite number, *Wamelink v. Cleveland*, 40 O. S. 381; but those who signed the petition seeking a different kind of improvement, which has been abandoned, cannot be added to a new petition to make up the required majority, *Makemson v. Kauffman*, 35 O. S. 444; signers to a petition which was rejected because deemed infor-



mal, but where the names were not withdrawn or revoked, and the petition remained on file may be added to the signers on a second petition to make up the majority, *Campbell v. Park*, 32 O. S. 544.

**Defect in petitions.**—The fact that one of the petitions was not properly recorded or acted upon will not affect the question of determining the majority of signatures, *Braden v. Commissioners*, 31 O. S. 386; *Campbell v. Park*, 32 O. S. 544; nor will the fact that the petition has been addressed to the wrong board. It will be deemed addressed to the body in charge of such matters. *Ryan v. Cincinnati*, 21 B. 62.

**Authority to sign.**—General manager and secretary of a corporation in the absence of express authority appearing, are not authorized to sign such a petition, *Minor v. Board*, 20 C. C. 4; the school board may sign for property under its control, *Becker v. Columbus*, 18 C. C. 888; the signature of a widow ratified by all the children was held valid, *Corry v. Cincinnati*, 6 N. P. 325; one entitled to dower in the property, but signing before assignment of dower cannot be counted as signer, *Corry v. Gaynor*, 22 O. S. 584, 594; tenants in common signing are to be separately counted as owners in severalty, *Makemson v. Kauffman*, 35 O. S. 444; owners of undivided interest may be counted for their proportion although all owners did not sign, *Tone v. Columbus*, 1 C. C. 305, 308; lessee holding under perpetual lease with privilege of purchase may be counted as owner, *Laird v. Cincinnati*, 5 B. 903; *Herman v. Columbus*, 15 Dec. 509; *Clemmer v. Cincinnati*, 28 C. C. 89; 7 C. C. (N. S.) 31; so of an owner conveying the fee to secure a loan and having a lease back with privilege of purchase, *Id.*; so of an agent signing his own name for his principal, *Columbus v. Sohl*, 44 O. S.

479; those signing because induced to do so by certain promises of others may be counted. *Makemson v. Kauffman*, 35 O. S. 444; life tenant may bind the property. *Herman v. Columbus*, 15 Dec. 509; 3 N. P. (N. S.) 216.

**Time of ownership.**—Only those signers can be counted who owned the property and signed before the ordinance was passed. *Tone v. Columbus*, 1 C. C. 305, 310; *Herman v. Columbus*, 15 Dec. 509; 3 N. P. (N. S.) 216.

**Withdrawal.**—Signers may withdraw their names at any time before the improvement is ordered. *Hayes v. Jones*, 27 O. S. 218; *McGonnigle v. Arthur*, 27 O. S. 251. But the withdrawal or remonstrance after a city has started with the work and has no longer authority to stop, is not permissible. *Columbus v. Slyh*, 44 O. S. 484.

Where petitioner died before final order to make the improvement, this will not constitute a withdrawal unless his successor in title withdraws the name. *Makemson v. Kauffman*, 35 O. S. 444.

**Change of plan.**—Where an improvement is justified by petition only it will not be valid if the municipal authorities have changed the work from that petitioned for, such as by lengthening or decreasing the part of the street which the petition sought to have improved. *Minor v. Board*, 20 C. C. 4.

A wholly different improvement from that ordered may be effected as well by subtracting from as by adding to it, and stopping the work before completion would result in an improvement which would fail to accomplish the purpose intended by the improvement as asked for. *Cincinnati v. Avenue Co.*, 26 O. S. 345.

**Burden of proof.**—The burden of proof is on those denying that a petition was properly signed and contained a majority. *Tone v. Columbus*, 1 C. C. 305, 39 O. S. 281.

**Estoppel by signing petition.**

—Petitioners for an improvement would ordinarily be estopped from claiming that the assessment exceeded the benefits, or that the law under which the assessment was made was unconstitutional. *Murphy v. Sims*, 27 C. C. 825; 7 C. C. (N. S.) 193; see also *Birdseye v. Clyde*, 61 O. S. 27; but see *Borger v. Columbus*, 27 C. C. 812; 6 C. C. (N. S.) 401; *Richter v. Norwood*, 11 Dec. 801; *Hildebrand v. Toledo*, 27 C. C. 427; 6 C. C. (N. S.) 450; *Shepard v. Barron*, 14 O. F. D. 417.

The question whether such petitioners are estopped to dispute the validity of the proceeding depends generally upon the question of the construction of their petition. *Hendrickson v. Toledo*, 23 C. C. 256; 3 C. C. (N. S.) 355.

If the petition does not agree that the signers shall be assessed certain expenses that they might have a right to contest if they did not so agree, and if they are signing under the belief that council is to proceed under valid laws, they are not estopped to dispute the legality of the proceedings or to contest an invalid assessment. *McGlynn v. Toledo*, 22 C. C. 34. (Aff'd, 47 B. 712.)

But where the property owners in a petition expressly agree that all the cost of the improvement may be assessed upon them they are estopped from denying the validity of the assessment even though the assessment is otherwise invalid as being, for example, for the cost of lands condemned. *Hendrickson v. Toledo*, 23 C. C. 256; 3 C. C. (N. S.) 355.

No estoppel arises from signing petition, which is referred back to property owners to file a new petition, and signer does not join in new petition. *Carlisle v. Cincinnati*, 8 C. C. (N. S.) 46.

See further as to estoppel same subject under § 62, *infra*.

**When petition not necessary.**

—When the requisite three-fourths of council concur in the resolution, etc., the petition of abutting property owners is not necessary. *Jessings v. Columbus*, 1 C. C. 90.

**Resolution awarding contract.**

—Resolution awarding a contract for the improvement is not within the requirement as to vote of council given. *Cincinnati v. Bickett*, 23 O. S. 49; see also *Cincinnati v. Avenue Co.*, 26 O. S. 345.

**FORM OF PETITION BY MAJORITY OWNERS.**

....., 19...

To the Council of the City [or Village] of....., State of Ohio:

We, the undersigned, owners of the number of feet of property set opposite our names below, the same being a majority of the foot frontage on.....street, between.....and.....(here insert termini of proposed improvement), hereby respectfully petition your honorable board to pass the necessary legislation therefor and to improve said street between the points aforesaid by (here describe character of improvement desired) and that so much of the entire cost and expense thereof as may be lawfully assessed upon the adjacent, contiguous or other specially benefited lots and lands, be assessed by a percentage of the tax value thereof [or "by the front foot," or "in proportion to the benefits that will result from said improvement"] upon the lots and lands bounding and abutting on said.....street between the points aforesaid, said assessments to be paid in.....annual installments or in cash, at the option of the owner of property assessed, in the manner provided by law for the levy and collection of assessments:

| Owner. | No. of feet front. | Lot Number. |
|--------|--------------------|-------------|
|        |                    |             |

NOTE.—The petition may be made by the owners of a majority of the foot frontage of property in any territory or district that may be assessed for the improvement.

The petition need not propose any method of assessment, but it would seem that it may do so.

#### FORMS OF RESOLUTION AND ORDINANCES AFTER MAJORITY PETITION.

##### 1.

##### RESOLUTION OF NECESSITY.

##### Resolution

Declaring it necessary to improve.....street, between..... and....., by (here describe character of improvement petitioned for).

Whereas, the owners of a majority of the foot frontage of property on .....street, between.....and..... (here insert termini of proposed improvement), have petitioned in writing for the improvement of said street, between the points named, by (here describe character of improvement petitioned for), now therefore,

Be it resolved by the council of the city [or village] of..... State of Ohio, Sec. 1. That it is necessary to improve, etc., (from here follow form of resolution under § 51 of the Code, making method of assessment conform to that petitioned for, if any method is requested in petition.)

##### 2.

##### ORDINANCE TO PROCEED WITH IMPROVEMENT.

##### Ordinance No.....

Determining to proceed with the improvement of.....street, from .....to....., by (here state nature of improvement).

Be it ordained by the council of the city [or village] of....., State of Ohio:

Sec. 1. That it is hereby determined to proceed with the improvement of.....street, from.....to....., by (here insert nature of improvement and character of materials to be used) in accordance with a resolution passed on the.....day of....., 19..., and the



petition of property owners described in said resolution, and in accordance with the plans, specifications, etc., (from here follow form of ordinance to proceed under § 55 of the Code, making method of assessment conform to that, if any, petitioned for).

## 3

## ASSESSING ORDINANCE.

(Follow form given under § 55 of the Code, making method of assessment conform as above.)

**Sec. 62.** [Improvement on petition of owners of abutting property.]<sup>1</sup> In cities or villages when a petition subscribed by three-fourths in interest of the owners of property abutting upon any street or highway of any description between designated points, is regularly presented to the council for the purpose, the entire cost of any improvement of such street or highway, without reference to the value of the lands of those who subscribed said petition, may be assessed and collected in equal annual installments, proportioned to the whole assessment, in a manner to be indicated in the petition or if not so indicated, then in the manner which may be fixed by the council; and the interest on any bonds issued by the corporation, together with the annual installments herein provided for, and the costs of such proceedings and assessments shall be assessed upon the property so improved; but when the lot or land of one who did not subscribe the petition is assessed, such assessment shall not exceed thirty-three per cent. of the tax value of his lot or land; provided, that the guardian of infants or insane persons may sign such petition on behalf of their wards only when expressly authorized by the Probate Court on good cause shown.<sup>2</sup>

(1) **Old sections** 2272 and 2305 R. S., repealed.

(2) **Three-fourths how determined.**—Three-fourths in interest is determined by the abutting feet and not by the feet assessable.

*Mocker v. Cincinnati*, 5 N. P. 242. See also *Andrew v. Auditor*, 5 N. P. 123.

**Separate petitions.**—When there are separate petitions asking for practically the same improvement

they may be counted together to make the required three-fourths. *Wamelink v. Cleveland*, 40 O. S. 381, 386. As to what is practically the same improvement, see *Wamelink v. Cleveland*, 40 O. S. 381.

**Conditional signing.**—As to effect of signature made on condition that another should pay the assessment and the condition not being fulfilled, see *Mills v. Norwood*, 38 B. 249.

The fact that a petition by three-fourths of property owners was endorsed "filed until signers agree to pay any deficiency" will not prevent its binding the signers. *Bush v. Cincinnati*, 18 C. C. 605.

**Authority to sign.**—The lessee of a perpetual lease may sign and bind his property to an unlimited assessment. *St. Bernard v. Kemper*, 60 O. S. 244. So may a trustee with power to dispose of property. *Andrew v. Auditor*, 5 N. P. 123. But a surviving partner may not sign such a petition. *Andrew v. Auditor. Id.* Nor general manager and secretary of a corporation without express authority. *Minor v. Board*, 20 C. C. 4. See further, notes under this heading § 61, *supra*.

**Withdrawal of names.**—See note this heading under § 61, *supra*.

**When less than three-fourths sign**—**Generally.**—A petition signed by less than three-fourths in interest not having been acted upon was held not to be good under a subsequent change of the law by which a less number of signers was made sufficient. *Hays v. Cincinnati*, 62 O. S. 116.

Where a petition is signed by less than three-fourths and the signers guarantee the city against deficiency in collection from non-signers such a petition is conditioned on

three-fourths signing, and signers are not to be subjected to the extra liability if improvement is made without the necessary signatures. *Goodall v. City*, 5 N. P. 428; *Whipple v. Toledo*, 7 C. C. (N. S.) 520.

The fact that the petition was not signed by the requisite three-fourths will not give one that did sign the right to enjoin the assessment or obtain damages. *Farrell v. Cincinnati*, 12 C. D. 724.

**Estoppel to deny frontage.**—Petitioner stating in the petition the number of feet front of his property, is estopped after work is done to claim that a less number of feet front is assessable. *Cincinnati v. Manss*, 54 O. S. 257; *Carson v. Delhi*, 12 C. D. 723.

So a petitioner owning a corner lot and signing for the frontage on the lengthwise side is estopped to resist assessment for the number of feet on that side. *Doppes v. Cincinnati*, 16 C. C. 183; *Frampton v. Sims*, 1 N. P. (N. S.) 355; 14 Dec. 271.

But such owner is not estopped to claim to be assessed only for the narrow frontage if he did not state the length of the lot in signing the petition, especially where the city had examined the frontage. *Gibson v. Cincinnati*, 9 C. C. 243.

And signing a petition for improvement of side street to be paid for by assessment per front foot on the lots abutting is not an admission that the frontage is on the side street. *Baker v. Schott*, 10 C. C. 81.

An owner is not estopped to deny the frontage stated in his petition if the petition was not signed by the requisite three-fourths. *Baker v. Schott*, 10 C. C. 81; and such owner is not estopped, if the petition was not necessary to enable the municipality to improve. *Edwards v. Columbus*, 7 N. P. 614.

**Estoppel to claim limitation on amount.**—Where a petition was presented asking that the entire cost be assessed on abutting property but was not signed by the requisite number it was held that the signers could be assessed only up to the limitation allowed by the general law and were not estopped to contest assessment of entire cost. *Hays v. Cincinnati*, 62 O. S. 116. See further *Storer v. Cincinnati*, 4 C. C. 279; *Nevin v. Dayton*, 4 N. P. 203.

Where petitioners agree to pay the entire cost irrespective of the number of signers to the petition, they are estopped to assert the statutory limitation on assessments. *Thornton v. Cincinnati*, 26 C. C. 33.

As to estoppel where signers to such a petition had notice that council intended to exceed the limit and made no objection to the proceeding and permitted council to go on and contract for the improvement, see *Storer v. Cincinnati*, 4 C. C. 279. See further *Frey v. Findlay*, 7 C. C. 311, 326. For other cases on estoppel, see *Locke v. Cincinnati*, 7 N. P. 318; *Kemper v. St. Bernard*, 14 C. C. 134; *Punshon v. Cincinnati*, 27 B. 155.

**Burden of proof** is on municipal authorities to show that the names of owners of requisite number of feet front were attached to petition. *Andrew v. Auditor*, 5 N. P. 123.

**Jurisdiction acquired.**—The city acquires jurisdiction when the petition is presented and if a signer is then owner the fact that he afterwards conveys the property is not material. *Laird v. Cincinnati*, 5 B.

903. But see *Herman v. Columbus*, 15 Dec. 509.

A petition becomes absolute when it is acted upon by the municipality. *Andrew v. Auditor*, 5 N. P. 123.

A petition properly signed, filed and attached to another petition will be deemed to have come to the knowledge of council. *Squier v. Cincinnati*, 5 C. C. 400.

Council does not lose jurisdiction over petition by reason of delay of two years in acting thereon. *Whipple v. Toledo*, 7 C. C. (N. S.) 520.

**Change of plan.**—In making an improvement petitioned for, council cannot depart from, or do other than what was asked. *Minor v. Board*, 20 C. C. 4. See further, *Cincinnati v. Avenue Co.*, 26 O. S. 345; *McGlynn v. Toledo*, 22 C. C. 34, (aff'd, 47 B. 712); *Deuyer v. Shonert*, 1 C. C. 73.

But additional incidental work, such as a tile drain, deemed necessary, may be put in, though not petitioned for. *Burke v. Wapakoneta*, 4 C. C. (N. S.) 482; *Taylor v. Wapakoneta*, 26 C. C. 285. As to case where petition does not specify manner of assessment or plan of proceeding, see *Whipple v. Toledo*, 7 C. C. (N. S.) 520.

**Assessment cannot exceed value of property.**—Where owner signs a three-fourths petition he may be assessed to the full value of his land abutting the improvement, but municipality cannot have a personal judgment for remainder of assessment not satisfied. *Laird v. Cincinnati*, 5 B. 903.

#### FORM OF PETITION BY OWNERS OF THREE-FOURTHS IN INTEREST.

To the Council of the City [or Village] of....., State of Ohio:

We, the undersigned, being the owners of the number of feet of property set opposite our names below, and being three-fourths or more in interest of the owners of property abutting upon.....street, between.....and....., (here state termini of proposed improvement) respectfully petition your honorable board for the improvement of said street between the points aforesaid, by (here describe character of improvement desired) and that the entire cost of said improvement, except only such portion thereof as is by law chargeable against the municipality, be assessed by a percentage of the tax value thereof [or "by the foot frontage," or, "in proportion to the benefits that will result from said improvement,"] upon the lots and lands bounding and abutting upon said.....street, between the points aforesaid.



And the undersigned and each of them consent and request that said assessments be levied and collected without reference to the value of the property of subscribers hereto, and waive all benefits of the statute limiting assessments to  $33\frac{1}{3}$  per cent. of the actual value of property assessed; said assessments to be payable in.....annual installments, proportioned to the whole assessment, or in cash, at the option of the owner of property assessed, in the manner provided by law for the levy and collection of assessments:

| Owner. | Number of feet front. | Lot Number. |
|--------|-----------------------|-------------|
|        |                       |             |

NOTE.—Although upon petition under § 62 above, council is authorized to assess the “entire cost” upon the property of those so petitioning, yet, in view of the words which follow, it appears that the object of the petition is to exclude the petitioners from the benefit of the  $33\frac{1}{3}$  per cent. limitation, and not to avoid payment by the municipality of its share under § 53 of the Code, or of the cost of property condemned or of damages to property abutting, (when the improvement involves these). But the petition for the improvement may be so drawn as to estop the petitioners from complaining of an assessment which includes even the cost of appropriating property as well as damages awarded to abutting owners. See Note 1, to § 2284 R. S., re-enacted in § 94 of the Code, notes on estoppel by petition under § 61 of the Code, and *Hendrickson v. Toledo*, 3 C. C. (N. S.) 355; 23 C. C. 256.

#### FORMS OF RESOLUTION AND ORDINANCES AFTER THREE-FOURTHS PETITION.

(These may be adapted from forms given where the owners of a majority of the foot frontage to be assessed petition for the improvement, under § 61 of the Code.)

##### *(e) Assessments on Municipal Property.*

#### **Sec. 63.** [Assessment on property of the corporation.]<sup>1</sup>

When the whole or any portion of an improvement authorized by this title passes by or through a public wharf, market space, park, cemetery, structure for the fire department, waterworks, school building, infirmary, market building, workhouse, hospital, house of refuge, gas works, public prison, or any other

public structure or public grounds within and belonging to the corporation, the council may authorize the proper proportion of the estimated costs and expenses of the improvement to be certified by the clerk of the corporation to the county auditor and entered upon the tax list of all taxable real and personal property in the corporation, and the same shall be collected as other taxes.<sup>2</sup>

(1) **Old section 2276 R. S., repealed.**

(2) **School property** belonging to the board of education, is not liable for street or sidewalk assessments. *Toledo v. Board*, 48 O. S. 83; *Board v. Toledo*, 48 O. S. 87. Section 2275a R. S., repealed, providing that the board of education should pay out of its funds assessments levied against school property was held unconstitutional in *Board v. Auditor*, 35 B. 294.

But see *Board of Education v. Bowland*, 15 Dec. 334; 3 N. P. (N.

S.) 122, *quere*: whether under present School Code school property is liable for street assessment. *Petition by Board of Education for street improvement does not make school property liable for assessment. Ib.*

**Lien of assessment** not defeated by subsequent purchase by Board of Education for school purposes. *Board of Education v. Bowland*, 15 Dec. 334; 3 N. P. (N. S.) 122.

**Assessments on municipal property.**—Subject discussed under former laws in *Dick v. Toledo*, 11 C. C. 349.

(f) *Second Establishment of Grade.*

**Sec. 64.** [Expense of changing established grades; how paid.]<sup>1</sup>

When a street, alley, public highway, wharf, or landing within the corporation is graded or pavements are constructed in conformity to grades established by the authorities of the corporation, and the expense is assessed on the lots or lands benefited thereby, the owners shall not be subject to any special assessment occasioned by any subsequent change of grade in such pavement, sidewalk, street, alley, public highway, wharf or landing, unless a petition<sup>2</sup> for such change is subscribed by a majority of the owners of such lot or lands; and the expense of all improvements occasioned by such change of grade, not so petitioned for, shall be chargeable to the general fund of the corporation.<sup>3</sup>

(1) **Old section 2301 R. S., see in Part II.**

(2) **Petition.**—For cases relating to signing of petition, determining majority, etc., see notes to §§ 61 and 62 of the Code.

(3) **Damages awarded abutters** cannot be included in the assessment on abutting property for change of grade. *McGlynn v. Toledo*, 22 C. C. 34 (aff'd 47 B. 712). But if owners petitioning ask that

all expenses be assessed on them, whether they will be estopped to dispute assessment to pay such damages, see *Hendrickson v. Toledo*, 2 C. C. 256; 3 C. C. (N. S.) 355.

(g) *Sprinkling and Cleaning.*<sup>1</sup>

**Sec. 65.** [Sprinkling, sweeping and cleaning of streets; ordinance for such purpose; appointment of commissioners in cities to determine and recommend amount of work necessary to be done on streets within a year.] Cities and villages shall have authority to sprinkle with water, sweep, and clean any streets or alleys, or parts thereof. All said work may be done by contract, or by and through the officers of such cities or villages. But before said work shall be done by or through the officers of any such city or village, the council thereof shall pass an ordinance authorizing the officer or officers having the care of streets and alleys to purchase or rent the necessary tools, machinery and appliances, to employ the necessary labor, and to do said work. In cities, the board of public service may appoint two electors, owners of real estate abutting on each street or alley, or part thereof, who shall act as commissioners for such street or alley, or part thereof, and who shall serve without compensation. Said commissioners shall be appointed for the term of five years, or until their successors are appointed, and any vacancy may be filled by said board of public service by the appointment of some qualified person. Said commissioners shall within ten days after such appointment, and in each year thereafter at such time as the board of public service may require, file with the board of public service a written statement of the sprinkling with water, sweeping, or cleaning, that in their opinion will be necessary to be done upon such street or alley, or part thereof, within any period between the first day of January and the thirty-first day of December of the year for which such statement shall be filed; and said board of public service, from the statements so filed and from such other information as may come to their knowledge, or upon failure of said commissioners to file such statement, may determine and recommend to the council, as provided in the next section, what work is necessary



to be done, upon said streets or alleys, or parts thereof, within any such period.<sup>2</sup> [1906, April 4, 98 v. 78; 97 v. 163.]

(1) **Old sections.**—For former provisions see §§ 2307 to 2312 R. S., inclusive (repealed).

**Other code provisions.**—By other Code provisions, power is given cities and villages through council, directors of public service and street commissioner to improve, light, clean and sprinkle streets, make contracts therefor and pay the expense by levy of taxes. (See §§ 28, 140, 203 and 32.) Under § 50 the cost of any of these things, including the cost of planting shade trees, may be paid for by special assessment.

§§ 65, 66 and 67 as contained in the Code as first passed provided for petitions for sprinkling, cleaning, etc. They were not in harmony with other provisions of the Code. The amendments of 1904 and 1906 have materially changed the character of these sections.

(2) **When work done by municipality.**—Specifications need not be prepared, as in case where work is let by contract. *Andrix v. Columbus*, 15 Dec. 672; 3 N. P. (N. S.) 368; (51 B. 227).

**Sec. 66. [Ordinance for sprinkling, sweeping, cleaning streets, etc.; notice.]** The council of any city upon the recommendation of the board of public service, or the council of any village, may provide by ordinance for such sprinkling with water, sweeping, or cleaning of said streets or alleys, or parts thereof. For the purpose of carrying out the provisions of this section and of the next preceding section, one ordinance may be made to include one or more streets or alleys, or parts thereof, and one or more of the powers granted by this section and the next preceding section. Notice of the passage of said ordinance shall be given the owners of lots and lands to be assessed for the payment of the cost and expense of the work provided for in said ordinance by publishing said ordinance, at least once, in some newspaper published and of general circulation within the corporation and no other or further notice shall be required. [1906, April 4, 98 v. 79; 97 v. 163.]

**Sec. 67. [Assessment of cost and collection thereof; bonds may be issued and sold; city may pay part of cost.]** The entire cost and expense connected with any work in any year authorized in the next two preceding sections, except as provided in this section, whether done by contract, or by and through the officers of said cities or villages, may, by ordinance, be assessed upon the abutting or other specially benefited property, and by any one of the methods mentioned in

section 50 of said act. The assessments so levied may be collected in one installment in the manner provided in the case of assessments for street improvements; provided, however, that the council may, if it deem expedient, levy and collect said assessments, at any time, before or after the completion of said work. The said assessing ordinance may be made to include the property abutting upon any one or more streets or alleys, or parts thereof, and one or more of the powers granted in the next two preceding sections. Bonds, notes or certificates of indebtedness may be issued and sold before or after doing such work in anticipation of the levy or collection of said assessments, and may be authorized and provided for in the assessing ordinance, or in a separate ordinance, provided, that no publication of the said assessing ordinance or of the said ordinance authorizing and providing for such notes, bonds or certificates of indebtedness shall in any case be required. No part of the cost and expense connected with said work shall be paid by the city or village, except that when the whole or any portion of any street or alley upon which said work shall be done passes by or through a public wharf, market space, park, cemetery, structure for the fire department, waterworks, school building, infirmary, market building, workhouse, hospital, house of refuge, gas works, public prison, or any other public structure or public grounds within and belonging to the corporation, and except as provided in section 53 of this act,<sup>1</sup> the council may authorize the proper proportion of the estimated cost and expense of the said work to be certified by the clerk of the corporation to the county auditor and entered upon the tax list of all taxable real and personal property in the corporation, and the same shall be collected as, and in addition to, all other taxes. The right of the city or village to levy said assessments shall not be affected by the tax valuation of the property to be assessed or by the amount of assessments theretofore levied upon said property. [1906, April 4, 98 v. 79; 97 v. 163.]

(1) **Limited to benefits.**—In the case of sprinkling, cleaning and repairing streets, the work may not enhance the market value of the property, and yet there would be a benefit, within the meaning of the

assessment laws, because its value for use by the owner would be enhanced. *Andrix v. Columbus*, 15 Dec. 673; 3 N. P. (N. S.) 368 (51 B. 227). See also *Walsh v. Sims*, 65 O. S. 211, 217.

(h) *Hearing on Assessments by Benefits.*

**Sec. 68.** [Appointment of board to report estimate of assessments.]<sup>1</sup> In cases wherein it is determined to assess the whole or any part of the cost of any improvement in proportion to the benefits which may result from such improvement, as provided for herein, the council may appoint three disinterested freeholders of the corporation to report to it the estimated assessment of such cost on the lots and lands to be charged therewith, in proportion as nearly as may be, to the benefits which may result from the improvement to the several lots or parcels of land so assessed, a copy of which assessment shall be filed in the office of the clerk of the corporation for public inspection.<sup>2</sup>

(1) **Old section 2277 R. S., repealed.**

(2) **Necessity for board.**—Under old § 2277 R. S. it was held that, if council determines to assess the cost of an improvement, not only on such lots and lands as abut on the improvement, but on such adjacent and contiguous or other property designated therein as benefited, in proportion to benefits, the amount of the assessment on such property cannot be fixed by council by the front foot, but must be fixed and determined in the first instance by the board of freeholders. It was held that § 2277 R. S. must be read in connection with § 2264 R. S. *Klein v. Cincinnati*, 7 C. C. 266. (Affirmed without report, 52 O. S. 650.)

**Apportionment.**—Such part of the cost may be assessed as is equivalent to the special benefit, but it must not exceed the benefit. *Chamberlain v. Cleveland*, 34 O. S. 551.

The assessing committee need not determine the total excess of benefits over amount of assessment, before apportioning the assessment. It is sufficient if, in the case of each lot, the assessment does not exceed the benefit and the lot bears only its just proportion of the total as-

essment. *Blair v. Cary*, 24 C. C. 560; 2 C. C. (N. S.) 25.

Irregularities in the proceedings by which the amount to be assessed on each lot was obtained will not invalidate the assessment, if a just result was reached. The committee need not proceed in any prescribed manner. *Ib.*

The presumption that members of an estimating board did their duty will not obtain as to duties not required of them, and it will not be presumed that they estimated and apportioned special benefits, but this must affirmatively appear of record. *Hill v. Cleveland*; 2 Clev. 385.

*Review of proceedings of a board estimating assessments*, see *Cordes v. Brooks*, 18 C. C. 801; *Toledo v. Ford*, 20 C. C. 290; *Price v. Toledo*, 25 C. C. 617; 4 C. C. (N. S.) 57; *Benham v. Cincinnati*, 26 C. C. 17.

*Under former statutes.*—Other cases, under former statutes on this subject, see *Krumberg v. Cincinnati*, 29 O. S. 69; *Meissner v. Toledo*, 31 O. S. 387; *Glenn v. Waddel*, 23 O. S. 605. And see *Cincinnati v. Batsche*, 52 O. S. 324.

**Notice of assessment** must be published. See § 2278 R. S., reenacted in § 94 of the Code.



## ORDER OF PROCEDURE FOR ASSESSMENTS BY BENEFITS.

1. Follow "order of procedure," given under § 51, *supra*, from "1" to "7," inclusive.
2. Resolution appointing estimating board. (§ 68 of the Code.)
3. Report of estimating board. (§ 68 of the Code.)
4. Notice of assessment made by estimating board, to be published. (§ 2278 R. S., re-enacted in § 94 of the Code.)
5. Objections filed by property owners assessed. (§ 2279 R. S., re-enacted in § 94 of the Code.)
6. Resolution appointing equalizing board and fixing a day for hearing objections, if any objections have been duly filed. (§ 2279 R. S., re-enacted in § 94 of the Code; and § 69 of the Code.)
7. Hearing of objections, if any duly filed. (§ 69 of the Code.)
8. Report of equalizing board. (§ 69 of the Code.)
9. Assessing ordinance, confirming report of equalizing board, or adopting assessment made by estimating board (in case no objections thereto have been filed) and otherwise in same form as assessing ordinance under § 55 *supra*.

## FORM OF RESOLUTION APPOINTING ESTIMATING BOARD.

## Resolution

Appointing board to report estimated assessment to pay the cost and expenses of improving.....

Whereas, it has been determined by council to assess the whole cost less 1-50 thereof and the cost of intersections [or ".....per cent. of the whole cost, less the cost of intersections"] of the improvement of .....street, from.....to..... in proportion to the benefits which may result from said improvement.

Now therefore:

Be it resolved by the council of the city [or village] of....., State of Ohio, that.....and....., three disinterested freeholders of said city [or village] be and they are hereby appointed a board to estimate the assessment of such cost on the lots and lands to be charged therewith as set forth in an ordinance No..... to improve said street, passed....., 19..., in proportion as nearly as may be to the benefits which may result from the improvement to the several lots or parcels of land so assessed and to report to this council the said estimated assessment.

Passed....., 19...

Attest:

.....

Clerk.

.....

President of Council.

## FORM OF REPORT OF ESTIMATING BOARD.

....., 19...

To the Council of the City [or Village] of.....

The undersigned, an estimating board, appointed and acting in pursuance of your resolution, passed on the.....day of....., 19..., respectfully report the following estimated assessment of the cost and

expenses of improving.....street, from.....to....., up-  
on the lots and lands to be assessed in accordance with Ordinance No.  
.....to improve said street, passed on the.....day of....., 19...:  
Assessment.

| Owner. | Description of Property. | Frontage and Depth. | Dollars. | Cents. |
|--------|--------------------------|---------------------|----------|--------|
|        |                          |                     |          |        |

The above assessments are in proportion to the benefits which will  
result to such lots and lands from said improvement, and are limited  
as to each lot and parcel by the special benefit conferred thereon.

.....  
.....  
.....

Estimating Board.

(A copy of above report must be filed in the office of the city or village  
clerk for public inspection.)

**Sec. 69.** [Equalization of assessments.]<sup>1</sup> On a day appoint-  
ed by the council for that purpose, the board, mentioned in sec-  
tion 2279 of the Revised Statutes of Ohio, after taking an  
oath before the proper officers, to honestly and impartially dis-  
charge their duties, shall hear and determine all objections to  
the assessment, and shall equalize the same, as they think prop-  
er, which equalized assessment they shall report to the council,  
which shall have the power to confirm the same, or set it aside,  
and cause a new assessment to be made and appoint a new  
equalizing board possessing the same qualifications, which  
shall proceed in the manner above provided. When the as-  
sessment is confirmed by the council, it shall be complete and  
final, and shall be recorded in the office of the clerk of council.<sup>3</sup>

(1) **Old section** 2280 R. S., re- add to or reduce total amount of  
pealed. assessment reported, except that it

(2) **Forms.**—See § 2279 R. S., may add compensation for services  
re-enacted in § 94 of the Code. of board. Chamberlain v. Cleveland,

(3) **Notice** of time of meeting of 34 O. S. 551. See also notes under  
board or of filing report need not be § 68, *supra*.  
given. Chamberlain v. Cleveland, 34  
O. S. 551.

**Power of board.**—Board cannot

(i) *Sidewalks, Curbing and Gutters.*<sup>1</sup>

**Sec. 70.** [Council to provide for construction and repair of sidewalks, curbing and gutters.]<sup>2</sup> The council of cities and villages may provide by ordinance<sup>3</sup> for the construction and repair of all necessary sidewalks, curbing, or gutters, or parts thereof, within the limits of the corporation, and may require by imposition of suitable penalties or otherwise, the owners and occupants of abutting lots and lands to keep the sidewalks, curbing and gutters in repair, free from snow or any nuisance.<sup>4</sup> [1904, April 21, 97 v. 123.]

(1) **Petition for sidewalk construction in villages.**—For act giving council in villages power to provide for construction of sidewalks upon petition of property owners, see act of April 26, 1904, found in Part II., p. 774.

(2) **Old section 2328 R. S., repealed.**

(3) **Sidewalk ordinance** is of general nature and must be read on three different days. See note (1) under § 1694, R. S., p. 319.

Council having passed a general ordinance for improvement of sidewalks, no special ordinance for any particular sidewalk is required, in order to assess abutting owner. *Westenhaver v. Hoytsville*, 28 C. C. 357.

(4) **Validity.**—It is not unconstitutional to impose upon lot owners the duty of making sidewalks. *Bonsall v. Lebanon*, 19 O. 418.

**Scope of power.**—Council may prescribe by resolution that portion of a street which shall be used as a sidewalk. *Cox v. Lancaster*, 24 C. C. 265; 2 C. C. (N. S.) 218 (aff'd, 69 O. S. 576); and council may narrow sidewalks already constructed without compensation to abutting owner, *Anderson v. Columbus*, 1 N. P. (N. S.) 541; 14 Dec. 180; but

where an abutting owner has constructed a sidewalk in conformity with an established grade, council cannot compel him to remove the sidewalk and construct on a higher level to conform to existing sidewalks constructed by other owners. *McGuire v. East Cleveland*, 1 C. C. (N. S.) 435; 25 C. C. 497.

As to reasonableness of ordinance requiring sidewalk on one side only and assessing owners on both sides, see *Mills v. Norwood*, 6 C. C. 305 and § 2332 R. S., re-enacted in § 94 of the Code.

It is an abuse of discretion for council to compel owner to change sidewalk in good repair from brick to cement, while permitting other owners on the same square to maintain brick walks. *Detmers v. Columbus*, 15 Dec. 212; 2 N. P. (N. S.) 657.

**Curbing.**—Whether curbing is a part of a street improvement or a sidewalk improvement, is a question of fact to be determined from all the circumstances. *Ehni v. Columbus*, 3 C. C. 494.

**Municipal liability** for failure to keep sidewalks in repair and free from nuisance, see notes under § 28 of the Code, p. 116.

## ORDER OF PROCEDURE IN SIDEWALK IMPROVEMENTS.

1. *Council may pass a General Ordinance* for the construction, repair and keeping in repair and free from snow or other nuisance of all sidewalks in the corporation. (§ 70 of the Code.) Such ordinance would be governed by §§ 140, 143, 198 and 203 of the Code with respect to the supervision of work and the letting of contracts.

2. *Resolution to construct or repair* certain specified sidewalks (where cost is to be paid by abutting owner) passed by council. § 71 of the Code.

3. *Notice to owner or agent* of the passage of said resolution; served as



summons in a civil action, or, if such owner is a non-resident, or, if neither such owner nor agent, nor their place of residence can be found, then publication of a copy of said resolution, as street improvement resolutions are published. (See § 51 *supra*.) §§ 71 and 72 of the Code.

4. *Work to be done by municipality at owners' expense*, if such sidewalks are not constructed within fifteen days or repaired within five days from service of notice or completion of publication. § 73 of the Code. The supervision of such construction or repair and the letting of contracts therefor would be governed by §§ 140, 143, 198 and 203 of the Code.

5. *Assessing Ordinance* to pay cost of constructing or repairing sidewalks under § 73, or the cost of constructing sidewalks and issuing bonds therefor under § 75, levying assessments therefor in any of the methods provided for street assessments. Such assessing ordinance would be governed by the limitations of § 53 of the Code. (*Norwood v. Bldg. Ass'n*, 7 C. C. 95; *Cincinnati v. Connor*, 55 O. S. 82.)

6. *Sidewalks constructed as street improvements*. The special method given in §§ 71, 72, 73 and 75 of the Code for the construction and repair of sidewalks, and outlined in the order of procedure from 2 to 5 inclusive, above, does not seem necessarily to exclude the exercise of the general authority given in § 50 *et seq.* to the councils of all municipal corporations to improve streets "by constructing sidewalks" along the same, and to assess the cost thereof as in other cases of street improvements.

**Sec. 71. [Notice to owners of abutting property to construct or repair sidewalks, curbing or gutters; return of copy of notice; service upon agent of owner.]**<sup>1</sup> When the council of cities or villages declares by resolution<sup>2</sup> that certain specified sidewalks, curbing or gutters shall be constructed or repaired, the clerk of council shall cause a written notice<sup>3</sup> of the passage of such resolution to be served upon the owner or agent of the owner of each parcel of land abutting on such sidewalk, who may be a resident of such city or village, in the manner provided by law for the service of summons in a civil action, and shall return a copy of such notice with the time and manner of service indorsed thereon, signed by the officer serving the same, to the department of public service in cities, and to council in villages which shall file and preserve the same; and for the purpose of such service, if the owner is not a resident of the city or village, any person charged with the collection of rents or the payment of taxes on such property or having general control thereof in any way, shall be regarded as the agent of the owner; and such return shall have the like force and effect as the sheriff's return on summons in a civil action. [1904, April 21, 97 v. 123.]

(1) **Old section** 2329 R. S., repealed.

(2) **Resolution ordering side-**

**walk** in front of a piece of property was held to be of a permanent nature and to require three readings.

Thatcher v. Toledo, 19 C. C. 311. If not so read, the construction of the sidewalk by city and assessment on owner who did not construct as ordered, will be invalid. *Ib.* And see Cincinnati v. Johnson, 17 C. C. 291.

(3) **Necessity for notice.**—City has no power to make the sidewalk itself unless the property owner has been notified and has had an opportunity to make it. Hunt v. Hunter, 11 C. C. 69. If the notice is not given the assessment for constructing is wholly void. Schmidt v. Elmwood Place, 15 C. C. 351.

**Character of notice.**—The notice must be reasonably specific as to place. Where a property owner owns 385 feet and the notice calls for 185 feet, not locating it, the owner is not in default for disregarding it. It is not his duty to locate the sidewalk. Cincinnati v. Mfg. Co., 7 B. 30.

Describing the property on a certain corner of two streets, without giving the number of feet to be paved, was, however, held sufficient. Cincinnati v. Gordon, 7 B. 79.

Notice to repair as showing knowledge of the city of defective condition, which caused an injury, see Shelby v. Clagett, 46 O. S. 549.

**Service of notice** was held to be necessary upon an owner who lives in the county but not in the municipality. 39 B. 113 (edit).

**Sufficiency of sidewalk.**—The council's determination as to the sufficiency of the sidewalk as constructed by the property owner is not to be reviewed by the court, or if reviewable, the property owner must show its sufficiency so clearly as to leave but little doubt. Cincinnati v. Longworth, 22 B. 153.

#### FORM OF RESOLUTION TO CONSTRUCT OR REPAIR SIDEWALKS.

Be it resolved by the council of the city [or village] of....., State of Ohio:

That a sidewalk shall be constructed on the.....side of..... street, from.....to....., of the character and in the manner following: (here state character of sidewalk, manner of constructing, materials to be used, etc.; or use the words, where applicable, "in accordance with the plans and specifications therefor on file in the office of the department of Public Service," or, in villages, "of the street commissioner.")

[Or, in case of repair, That the sidewalk in front of the premises of....., on the.....side of.....street, between..... and....., being lot No.....of.....sub-division, and known as No....., .....street, be repaired in the following manner: (here describe character of repairs required).]

That the clerk of council be and he is hereby directed to cause a written notice of the passage of this resolution to be served as required by law.

Passed....., 19...

Attest:

.....

Clerk.

.....

President of Council.

#### FORM OF NOTICE TO CONSTRUCT OR REPAIR SIDEWALKS.

To.....:

You are hereby notified that in accordance with a resolution passed by the council of the city [or village] of....., State of Ohio, you are required to construct [or repair] a [or the] sidewalk in front of your premises on the.....side of.....street, between.....and....., being lot No.....of.....subdivision, and known as No....., ..... street, of the character (in case of construction) and in the manner following: (here repeat requirements of resolution).

If said sidewalk is not constructed within fifteen days [or, repaired within five days] from the service of this notice, the department of public service [or in villages, the council] will have the same done at your expense, and such expense will be assessed upon your property and made a lien thereon and be collected in the manner provided by law, with penalty and interest if not paid as required in the levy of assessment.

....., 19....

.....  
Clerk of Council.

#### FORM OF RETURN.

Received the within notice on the.....day of....., 19...., and served the same by delivering a true copy thereof personally (or insert any other method in conformity with requirements of law for service of civil actions) upon....., on the .....day of ..... , 19... , at..... M.

.....  
(Officer serving notice.)

If curbing and gutters are also to be provided for, the forms given may be easily adapted.

#### **Sec. 72. [Notice to non-residents and persons not found.]<sup>1</sup>**

If it appear in the return in any case of the notice provided for in the preceding section, that such owner is a non-resident of the county, or that neither any such owner, nor agent, nor their place of residence could be found, then a notice given by publication of a copy of the resolution in some newspaper of general circulation in the corporation, in the manner heretofore provided for the service by publication of resolutions for street improvements<sup>2</sup> shall be deemed sufficient notice to such owner, but no publication of said resolution shall be necessary in the case of construction or repair of sidewalks, curbing and gutters where said notice is served upon the owner or agent as provided in section 71. [1904, April 21, 97 v. 124.]

(1) **Old section 2329 R. S. (rep).**

(2) See § 52 of the Code.

#### **Sec. 73. [In cities; on failure of owner to construct or repair, same to be done at his expense.]<sup>1</sup>**

If such sidewalks, curbing or gutters are not constructed within fifteen days, or not repaired within five days from the service of notice, or completion of the publication, the department of public service in cities may do or have the same done at the expense of the owner,<sup>2</sup> and all such expenses shall be assessed on all the property abounding or abutting thereon. Said assessments shall be collected in the same manner with a penalty of five per centum and interest for failure to pay at the time fixed by the assessing ordinance, as in cases of improvements.<sup>3</sup> No other or further proceedings for the construction or repair of sidewalks, curbing or gutters and levying assessments therefor,



shall be necessary by the department of public service, than the proceedings required under this and the two preceding sections,<sup>4</sup> and in any case in which special assessments have been made on property of all the cost of the construction or repair of sidewalks, curbing or gutters under this and said two preceding sections as they stood before this amendment, said assessment shall, within the limitation of benefits and the limits of thirty-three per cent. of the taxed value of the property, be valid assessments upon said property.

[In villages; on failure of owner to construct or repair, same to be done at his expense.] If such sidewalks, curbing or gutters are not constructed within fifteen days, or not repaired within five days from the service of the notice, or completion of the publication, the council in villages may have the same done at the expense of the owner and report the cost thereof to such owner. The cost of such construction or repair shall constitute a lien on the property abutting on such sidewalks from the date the same is so reported to such owner, and shall be paid by the owner to the treasurer of the municipality. If the cost of said construction or repair is not paid within ten days from the time the same has been reported to such owner, the clerk in villages shall certify the same, together with a penalty of five per centum thereon to the county auditor, who shall place the same on the tax duplicate and collect such costs and penalties in the same manner as other taxes are collected. [1906, April 16, 98 v. 301; 97 v. 124.]

(1) **Old section** 2330 R. S., repealed, § 2330d (95 O. L. 604) repealed.

(2) **Validity.**—A provision such as this held constitutional. *Bonsall v. Lebanon*, 19 O. 418.

**Necessity of notice** before city can construct and charge abutting owner, see *Hunt v. Hunter*, 11 C. C. 69; *Schmidt v. Elmwood Place*, 15 C. C. 351.

(3) **Limitation of sidewalk assessments.**—Under former laws assessments for sidewalks were held to be governed by a statute limiting street assessments to twenty-five per cent. of the value of the property assessed. Upon the same principle § 53 of the Code, limiting all assessments for public improvements

to thirty-three and one-third per cent. of the value of the property assessed would apply to sidewalk assessments. *Norwood v. Bldg. Ass'n*, 7 C. C. 95. See also *Cincinnati v. Connor*, 55 O. S. 82. But see *Westenhaver v. Hoytsville*, 28 C. C. 357.

**Form of assessing ordinance** may be adapted from form under § 75 of the Code.

(4) **Method of improvement.**—The method given in this and sections immediately preceding is intended to be distinct from method provided in § 50 *et seq.* under which sidewalks may also be constructed and repaired. The legislature had in view an alternative procedure for sidewalk improvements. *Westenhaver v. Hoytsville*, 28 C. C. 357.

**Sec. 73a.** [Assessment of cost for construction or repair of sidewalks, curbings or gutters; how paid.] When sidewalks,

curbing or gutters are constructed or repaired in accordance with the section to which this section is supplementary, the assessment for the cost thereof may be made payable in full not less than thirty nor more than sixty days from the levy thereof or in not exceeding five annual installments, as council may determine. In anticipation of the collection of said assessments bonds of the municipal corporation may be issued bearing interest not exceeding six per cent. per annum and the proceeds thereof used in the payment of the cost incurred by reason of such construction or repair. In the passage of the resolution declaring that certain specified sidewalks, curbing or gutters shall be constructed or repaired and in all the subsequent procedure necessary to secure the construction or repair of sidewalks, curbing or gutters, and collect the assessment therefor, sidewalks, curbing or gutters, although upon different streets and abutting upon lots or land owned by different persons, may be provided for in the same resolution, notice, contract, and ordinance or other step in such procedure. [1904, April 25, 97 v. 384.]

**Sec. 74.** [Notice to owners of abutting property to clean sidewalks, etc.]<sup>1</sup> When the council in villages or the board of public service in cities declares by resolution that a certain specified sidewalk or sidewalks, curbing or gutters shall be cleaned so as to be free from weeds, grass, dirt, snow or any other objectionable substance, it shall then be the duty of the clerk of the council in villages and of the board of public service in cities to cause notice of the passage of such resolution to be served upon the owners of each parcel of land abutting on such sidewalk ordered cleaned. Such notice shall be given in the same manner as is provided for service of notice to construct sidewalks.

[On failure of owners to clean such sidewalks, etc., same to be done at their expense.] If said sidewalks, curbing or gutters are not cleaned within five days, except if the objectionable substance be snow, then within one day, after the service of the

notice or completion of the publication, the department of public service in cities and the street commissioner in villages shall have the same done at the expense of the owner and report the cost thereof to him, and to council in villages, and to the board of public service in cities. The cost of such cleaning shall constitute a lien upon the property abutting on such sidewalks from the date the same is so reported, and shall be paid by the owner to the treasurer of the municipality. If the cost of said cleaning is not paid within ten days from the time the same has been so reported, the said clerk in villages and the department of public service in cities shall certify the same, together with a penalty of five per centum thereon to the county auditor, who shall place the same on the tax duplicate and collect such costs and penalties in the same manner as other taxes are collected. [1904, April 21, 97 v. 124.]

(1) See old § 2329a R. S., re- **Forms** of resolution and notice  
pealed. may be adapted from forms under

(2) See notes to § 73, *supra*. § 71 *supra*.

**Sec. 75. [Construction of sidewalks, curbing or gutters; bond issue authorized.]**<sup>1</sup> In cities and villages, whenever sidewalks, curbing or gutters are to be constructed pursuant to a resolution of council, the department of public service in cities and council in villages, may construct such sidewalk or parts thereof, or curbing or gutters or parts thereof,<sup>2</sup> and assess<sup>3</sup> the cost and expense thereof upon the abutting, adjacent and contiguous or other specially benefited property<sup>4</sup> according to the rule heretofore provided for street improvements; and to carry out such purpose, council is hereby authorized to issue bonds of such city or village, in denominations not to exceed one thousand dollars, each to be payable in not less than one nor more than ten years, and to bear interest at a rate not to exceed six per centum per annum, which bonds shall not be sold for less than their par value and the proceeds arising from such sales shall be applied to the cost of such improvements, the



cost of issuing such bonds, the payment of interest thereon and to no other purpose. The assessments shall be in such amounts as will be sufficient to provide for the payment of such bonds and the interest due thereon as the same mature, and such assessments shall be certified to the auditor of the county in which such city or village is situated, to be placed upon the duplicate, and shall be a lien upon all property so assessed if such assessment is not paid within the time fixed in the assessing ordinance.

(1) **Old sections**, see §§ 2330a, 2330b, R. S., repealed.

(2) **Certificate of money** in treasury was held not to be required in case of a contract for construction of sidewalks where the act contemplates that the money shall not be in the treasury by providing that the money is to be raised by a bond issue. *Trowbridge v. Hudson*, 24 C. C. 76.

**Discretion of council** as to rejection of bids under former § 2330b, R. S. See *Trowbridge v. Hudson*, 24 C. C. 76.

(3) **Corner lot doctrine** was held not to apply to sidewalk assessments. *Baker v. Schott*, 10 C. C. 81. (Affirmed, 31 B. 335.)

(4) **Assessing ordinance—How passed**.—The language used above indicates that the assessing ordinance for sidewalk improvements is to be passed, in cities, by the board of public service. It appears to have been adapted from the old special law in § 2330a R. S., repealed, and doubtless the intention was to give

the power to *construct* sidewalks to the board of public service in cities and to councils in villages and the power to *levy assessments therefor* to council in all municipalities. This is in harmony with §§ 51 and 53, *supra*, empowering *council only* to levy assessments to pay the cost of all improvements, including sidewalks, and imposing the duty upon council to limit such assessments, as well as many other provisions of the Code. It would seem the better course, therefore, that the assessing ordinance above referred to be passed by council, though any question as to regularity may be avoided by concurrence in such ordinance by the board of public service. As to the manner of passing such ordinances, if by the board of public service, see *Cincinnati v. Johnson*, 17 C. C. 291; *Cincinnati v. Spillard*, aff'd without report, 62 O. S. 637.

**Damages for change of grade**.—Provisions relating thereto held to apply to sidewalk improvements. *City v. Gordon*, 7 B. 79.

#### FORM OF ASSESSING ORDINANCE FOR SIDEWALK IMPROVEMENT.

Ordinance No. ....

To levy special assessments for the construction of sidewalks on ..... street, between ..... and .....

Be it ordained by the council of the city [or village] of....., State of Ohio:

Sec. 1. That to pay the cost and expenses of constructing sidewalks on .....street, between.....and....., in accordance with the resolution of council passed on the.....day of....., 19...., there be levied and assessed upon the lots and lands hereinafter described the several amounts herein set forth, viz.:

| Assessment. |                          |          |        |
|-------------|--------------------------|----------|--------|
| Owner.      | Description of property. | Dollars. | Cents. |
|             |                          |          |        |

Which assessments are.....dollars and..... cents per front foot of the property bounding and abutting on the.....side of.....street, between.....and.....

(In case of assessments by a percentage of tax value or according to benefits, see form under § 55 *supra*.)

Sec. 2. (Same as assessing ordinance under § 55 *supra*; and see requirements of § 73a.)

Sec. 3. That to provide a fund for the payment of the cost and expenses of constructing sidewalks as aforesaid, the mayor and auditor [or in villages, clerk], be and they are hereby authorized to issue and sell the bonds of the city [or village] of....., according to law, (bonds must not exceed \$1,000 in denominations, they must be payable in not less than one, nor more than 10 years, and must first be offered for sale to the sinking fund trustees, and if not sold to said trustees, they must be advertised, etc. See §§ 75, 95 and 97 of the Code.), and the proceeds arising from such bonds shall be applied to the cost of such construction of sidewalks, the expenses of issuing such bonds, the payment of interest thereon, and to no other purpose whatsoever; and for the payment of said bonds and interest thereon the revenue and faith and all the real and personal property of the city [or village] are hereby pledged; provided, that if within the time above specified, and before the sale of the said bonds any of the owners of said property shall pay their total assessments in cash, the aggregate sum in bonds shall be reduced by deducting the amount so paid from the total amount of the fund to be provided, and the bonds issued shall be reduced accordingly.

Sec. 4. That the proceeds arising from the sale of said bonds, together with all moneys received from the cash payments of assessments, shall be placed in the city [or village] treasury, and disbursed upon proper vouchers for the purposes herein provided.

Sec. 5. That the installments of assessments and all portions thereof, shall be applied to the payment of said bonds and interest, as the same shall become due, and to no other purpose whatsoever.

Sec. 6. That this ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed....., 19...

Attest:

.....  
Clerk.

.....  
President of Council.

(All assessments not certified to the county auditor must be paid to the city or village treasurer. No authority seems to be given to assign such assessments to the contractor. See § 94 of the Code.)

**Sec. 76. [Construction of sidewalks along property of the corporation.]**<sup>1</sup> In all cases where it is deemed necessary by a municipal corporation to build or repair sidewalks, curbing or gutters along that portion of any street, alley or public highway which passes by or through any public wharves, market spaces, parks, cemeteries, public grounds or buildings, the proper proportion of the estimated expense thereof shall be by the council of such corporation levied, certified and collected in the manner provided herein for the assessment of street improvements. [1904, April 21, 97 v. 125.]

(1) **Old section** 2334 R. S., repealed. Old § 2334 R. S. supplemented 95 O. L. 416, repealed.

*(j) Sewers.*

**Sec. 77. [City engineer to devise plan of sewerage.]**<sup>1</sup> In addition to the power herein conferred to construct sewers and levy assessments therefor, council of a city or village may provide a system of sewerage for such municipal corporation or any part thereof; it shall be the duty of the engineer of such city or village, or some person employed by the municipality, to devise and form, or cause to be devised and formed, a plan of the sewerage of the whole city or village, or such part thereof as may be designated by the council; and such plans shall be devised with regard to the present and prospective needs and interests of the whole city or village; which plans shall be by him reported to the council for its confirmation.<sup>2</sup>



(1) **Old section.**—Compare § 2366 R. S., repealed.

(2) **Adoption of system** of sewerage was held, under former laws, not necessary to be first made before a single independent sewer could be constructed. The general power to build sewers given to municipalities would not be restricted by provision as to a sewerage system, unless a system had been previously found necessary. *Hartwell v. R. R. Co.*, 40 O. S. 155.

Where a system is adopted, failure to provide plans and specifications and estimates of expense, was held not jurisdictional and no defense to sewer assessments. *Toledo v. R. R. Co.*, 4 C. C. 113.

Discretion of council in devising a plan of sewerage cannot be interfered with by the court unless grossly abused. *Johnson v. Avondale*, 1 C. C. 229.

**House connections.**—It was held that an act giving authority to a municipality to provide "a plan of sewerage and drainage" would not give the municipality power to make house connections, unless such house connections were made part of the plans and specifications and duly published. *Cordeman v. Cincinnati*, 23 O. S. 499, 507.

**Tapping Sewers.**—Old § 2402 R. S., repealed, provided expressly for tapping sewers for private use. But the authority to construct and maintain sewers doubtless includes the authority to provide by ordinance rules and regulations for tapping sewers for private use. In paragraph 13 of § 7 of the Code, authority is given to provide by ordinance for licensing sewer-tappers. For questions arising under former laws as to tapping sewers, see *State ex rel. v. Board*, 4 B., 293; *Herrmann v. State ex rel.*, 54 O. S., 506;

*Springmeyer v. State ex rel.*, 1 C. C., 501; *State v. Graydon*, 6 C. C., 634.

**Municipal liability.**—Failure to provide sewers would not make a municipality liable for damages resulting from its neglect. *Springfield v. Spence*, 39 O. S. 665, 669; *Dayton v. Taylor's adm'r*, 62 O. S. 11.

Thus, injury caused by failure of municipality to provide for carrying off surface water was held not to make it liable. *Ib.*

**Defect in plans.**—Nor will the municipality be liable because the plans it has adopted are not sufficient or proper. The manner in which drainage may be accomplished is peculiarly within the discretion of the municipal corporation and it cannot be called to account by the courts for its errors of judgment in the plans of a public improvement for drainage adopted by it. *Wheeler v. Cincinnati*, 19 O. S. 19, 22; *Dayton v. Taylor's adm'r*, 62 O. S. 11.

**Negligence in constructing.**—But for damages due to negligence in the construction of a sewer, the municipality will be liable. *Cummings v. Toledo*, 12 C. C. 650; *Columbus v. Jaeger*, 36 B. 191; see also *Dayton v. Taylor's adm'r*, 62 O. S. 11, 16.

But injuries resulting from construction, if not caused by the city's negligence in the work, will not make the municipality liable. *Columbus v. Jaeger*, 36 B. 191; *Cummings v. Toledo*, 12 C. C. 650. And see generally, *Cincinnati v. Penny*, 21 O. S. 499.

Municipality is not liable for destroying, in the course of construction of a sewer, local drainage connections made without its consent. *Miller v. Toledo*, 12 C. C. 706.

**Failure to keep in repair** will also make the municipality liable. After the construction of an improvement, if notice should be brought home to the municipality that a street was not reasonably safe because of faulty construction of the improvement, it becomes the duty of the municipality to remove the defect and its failure to do so, will make it liable in damages for injuries resulting from such defect. *Dayton v. Taylor's adm'r*, 62 O. S. 11, 16; *Cincinnati v. Frey*, 16 Dec. 77; 3 N. P. (N. S.) 627.

**Pollution of water course** by a municipality in discharge of its sewerage will make it liable, as an individual would be liable. *Cleveland v. Beaumont*, 4 B. 345; *Cilly v. Cincinnati*, 2 B. 135; *Mansfield v. Balliett*, 65 O. S. 451; *Rhodes v. Cleveland*, 10 O. 160.

Such pollution, if continued for a period of twenty-one years, would give municipality prescriptive right, and it will not thereafter be liable to riparian owners for such pollution. *Cleveland v. Standard Bag & Paper Co.*, 72 O. S. 324; *Tepe v. Norwood*, 48 B. 876. Riparian

owner cannot recover against municipality damages for pollution if he contributes to such pollution. *Tepe v. Norwood*, 48 B. 876 (aff'd, 71 O. S. 520); *Kemper v. Home*, 6 Dec. Re. 1049. See also *Cleveland v. Standard Bag & Paper Co.*, 72 O. S. 324.

**Limitation of action.**—Action against municipality for damages growing out of overflow of plaintiff's lands from negligent construction of municipal drains, is an action of trespass and nuisance and four-year limitation is applicable. *Norwalk v. Blatz*, 51 B. 21 (Ed.).

**Injunction** to restrain the municipality from emptying sewage into a stream to plaintiff's injury would lie. *Cilly v. Cincinnati*, 2 B. 135.

**Evidence.**—Proof of adoption of sewerage system and plan of districting must be made by the ordinances and not by the testimony of the engineer. *Cleveland v. Beaumont*, 4 B. 345.

**Measure of damages** where owner's property is injured by break in sewer, see *Toledo v. Grasser*, 12 C. C. 520.

## ORDER OF PROCEDURE IN SEWER IMPROVEMENTS UNDER GENERAL PLAN.

1. *Adoption of general plan.* Where it is desirable to make sewer improvements under a general plan or system, council should, by resolution, direct the engineer of the city or village to prepare such plans, either for the whole municipality or for such portion as council may determine. (§ 77.)

The engineer should then prepare such plans observing the requirement of §§ 78 and 79, and report the same to council.

2. *Notice of completion of plan* and that the same is ready for public inspection should be given by publication for ten days. (§ 80.)

3. *Objection to plan* by persons interested may then be filed with council, and council may thereupon, amend the plan. (§ 81.) The plan, as originally presented or as amended, as the case may be, should then be confirmed by council by ordinance, setting out the plan, and the plan should be filed in the office of the auditor (in cities) or clerk (in villages).

4. *Designation of part to be constructed.* Council should next, by resolution, designate the part of the general plan that is to be carried out in the particular improvement to be made. The resolution should show what district, giving its boundaries, or what part of a district, is to be improved. (§ 83.) The resolution may order the engineer to make an estimate of the cost of constructing sewers in accordance with the part of the plan designated, and report the estimated cost to council.

5. *Resolution declaring necessity* of the proposed sewer improvement which should contain (1) a statement of the district or part of district proposed

to be improved, giving its boundaries as in the designated resolution, (2) The character of the materials to be used, (3) A statement that the improvement is to be made in accordance with the plans and specifications of the engineer, referred to in the resolution, together with a statement as to place where they are on file, (4) the mode of payment for the improvement, determining the proportion to be assessed and the method of the assessment, as well as the method of payment of the remainder of the costs, whether by levy upon the general tax list or by special bond issue. (§ 84.)

As to notice to owners, of this resolution, see § 60 as amended, p. 221.

6. *Ordinance to improve*, which should contain (1) an expression of council's determination to proceed with the improvement, (2) a description of the district or part of district to be improved, as given in the preceding resolution, (3) a statement of the character of material to be used, (4) a statement that the improvement is to be made according to the plans and specifications of the engineer, (5) The mode of payment as in the preceding resolution, and naming the lots and lands to be assessed, in each district, or part of district, separately. (§ 85.)

7. *Advertisement for bids and award of contract* as in case of other street improvements. (§§ 86, 59, 143, 144, 198.)

8. *Certificate of Engineer* showing completion of work, made to council. (§ 87.)

9. *Assessing ordinance*, in conformity with ordinance to improve, making the assessment by districts and giving the amount of assessment on each lot or land. (§ 87.)

NOTE.—The procedure above is only for cases where council adopts a general plan of sewerage. Improvement by constructing sewers where no general plan has been adopted, may be made in the manner provided in §§ 50 to 63 inclusive, relating to street improvements generally. (§§ 77, 88.)

**Sec. 78. [Sewer districts.]<sup>1</sup>** The plan so devised shall be formed with a view of the division of the corporation into as many sewer districts as may be deemed necessary for securing efficient sewerage. Each of the districts shall be designated by a name and number, and shall consist of one or more main sewers, with the necessary branch or connecting sewers; the main sewers having their outlet in a river, or other proper place.<sup>2</sup> The districts shall be so arranged as to be independent of each other, so far as practicable.

(1) **Old section 2370 R. S.**, repealed.

(2) **Discretion of council** in determining what is a proper outlet cannot be interfered with by the courts, unless grossly abused. *Johnson v. Avondale*, 1 C. C. 229, 232.

An extension, giving a proper outlet, which was contemplated at the time the sewer was built, would satisfy the statute. *Wilson v. Cincinnati*, 5 N. P. 68.



**Sec. 79. [How plan to be prepared.]**<sup>1</sup> The plan shall be so prepared as to show the size, location, inclination and depth below the surface of all main sewers and all branch sewers connected therewith.

(1) **Old section 2374 R. S., repealed.**

**Sec. 80. [Notice of completion of plans to be advertised.]**<sup>1</sup> When such plan of sewerage has been prepared, the council shall give at least ten days' notice<sup>2</sup> in one newspaper of general circulation in the corporation, stating that such plans have been prepared and are filed in the office of the clerk for examination and inspection by parties interested.

(1) **Old section 2375 R. S., repealed.** jurisdictional under former statutes, and did not invalidate assessments.

(2) **Necessity of notice.**—Omission to advertise was held not jurisdictional under former statutes, and did not invalidate assessments. Cincinnati v. Honnigfort, 32 B. 32; Columbus v. Bohl, 13 Dec. 569; 1 N. P. (N. S.) 469.

#### FORM OF NOTICE OF COMPLETION OF PLAN FOR SEWERAGE.

##### Legal Notice.

Notice is hereby given that plans for the sewerage of the city [or village] of.....[or for the sewerage of the following described territory of the city, or village of.....(here describe part of municipality designated by council)], have been prepared and are now on file in the office of the clerk of the city [or village] for examination and inspection by parties interested, and any objection thereto may be filed with council.

....., 19....

By order of the Council of the City  
[or Village] of.....

.....

Clerk.

**Sec. 81. [Objections to plans.]**<sup>1</sup> Any objection to said plan of sewerage shall then be made to the council, and it may, if it deem proper, amend or correct the same, and shall thereupon file the plans as amended, or if no amendments be made, then the original plans, duly certified by it in the office of the auditor or clerk.

(1) **Old section 2376 R. S., repealed.**

**Sec. 82. [Amendment of plans, etc.]**<sup>1</sup> Council shall have the right at any time after the construction of all or a part of the sewers provided for by such plan of sewerage to amend such plans, by providing for such intercepting sewers, without regard to sewer districts, as shall be necessary to furnish an additional outlet for the system so adopted, and to provide for the construction of the same as is provided in this subdivision, and apportion the cost and expense thereof, equally among the districts directly or indirectly sewered in whole or in part thereby, and assess and collect the amount apportioned to each district as provided in this subdivision; or the council may apportion a part only of such cost and expense among the districts directly or indirectly sewered in whole or in part thereby, and provide for the payment of the residue thereof by the city at large. The council may also amend such plans by making new sewer districts, or by subdividing districts already established, giving a name and number thereto, and provide for the construction of the main and branch sewers therein, and may assess the cost and expense thereof upon the lots and lands within the corporation according to benefits.

(1) **Old section 2376 R. S.** repealed.

**Sec. 83. [Engineer to estimate costs, etc.]**<sup>1</sup> After such plans have been adopted and approved, as heretofore provided, the council shall designate such portions of the work as may be required for immediate use, and the designation shall be by districts, and shall show what districts or part thereof, is to be improved; and the council may order the engineer to make an estimate of the cost and expense of constructing the work, or such portions thereof as may have been designated in accordance with the last section, according to such plans, and report the same to council.<sup>2</sup>

(1) **Old section** 2373 and 2377 R. S., repealed.

Curative provisions of § 2289 and 2327 R. S. held to extend to irregularities or defects in the estimate of cost for sewerage. *Wewell v. Cincinnati*, 45 O. S. 407.

(2) **Necessity of estimate.**— Failure to cause estimate to be made held not a defense to assessment. *Toledo v. Ry.*, 4 C. C. 113.

**Sec. 84.** [Resolution of necessity and notice thereof.]<sup>1</sup> When it is deemed necessary by a city or village to construct all or a part of the sewers provided for in said plan, the council shall declare by resolution the necessity of such improvement.<sup>2</sup> Said resolution shall contain a declaration of the necessity of said improvement, a statement of the district or districts or parts thereof proposed to be constructed, the character of the materials to be used, a reference to the plans and specifications, where the same are on file, and the mode of payment therefor, and the council shall cause the resolution to be published once a week for not less than two nor more than four consecutive weeks in one newspaper of general circulation in the corporation.<sup>3</sup>

(1) **Old section.**— Compare § 2378 R. S. (repealed) requiring only the ordinance to improve. But old § 2304 R. S. (repealed) required resolution of necessity for all public improvements.

(2) **Necessity, object, etc., of resolution.**— See notes to § 51 of the Code, p. 183.

(3) **Published notice.**— Where published notice describes property by streets and omits certain streets, and these streets were also omitted in the resolution,— as to validity of assessment on such streets, see *Cincinnati v. Honnigfort*, 32 B. 32.

**Notice to owners.**— See Code § 60 as amended, p. 221.

#### FORM OF RESOLUTION DECLARING NECESSITY.

##### Resolution

Declaring it necessary to construct sewers in district.....[or part of district....., or district consisting of territory bounded .....].

Be it resolved by the council of the city [or village] of....., State of Ohio,

That it is necessary to construct all [or a certain part hereinafter described] of the sewers provided for in a general plan for a system of



sewerage, for said city [or village] (or, if the plan was for a part only, of the municipality, then say "for the territory bounded as follows," inserting boundaries in general plan) which general plan was adopted by council on the.....day of....., 19..., and is now on file in the office of the auditor of said city [or clerk of said village]; and that the portions of the work provided for in said general plan, which it is hereby determined to construct are as follows: (here describe by districts or parts of districts, the territory that is to be improved, giving the boundaries of each district or part of district included, following the description in the resolution designating the part to be improved).

Be it further resolved, that said sewers shall be constructed in accordance with plans and specifications, on file in the office of the auditor of said city [or clerk of said village] and shall be of..... (here insert materials to be used).

Be it further resolved, that the costs..... (here follow §§ 4 and 5 of form of resolution to improve under § 51 of the Code).

Be it further resolved, that the clerk be and he is hereby directed to cause this resolution to be published in the manner provided by law.

Passed....., 19...

Attest:

.....  
Clerk.

.....  
President of Council.

**Sec. 85.** [Ordinance authorizing construction; what to contain.]<sup>1</sup> After the publication of said notice, the council shall determine whether it shall proceed with the proposed improvement or not, and if it decides to proceed therewith, an ordinance for the purpose shall be passed.<sup>2</sup> Said ordinance shall contain a statement of the district or districts or parts thereof proposed to be constructed, the character of the material to be used, a reference to the plans and specifications, the mode of payment therefor, and said ordinance shall provide for assessing the cost and expenses of the improvement upon the lots and lands in each district as other assessments are levied, and the lots and lands in each district shall be assessed by districts, except that the cost of the construction of any main sewer which serves as a common outlet for two or more districts shall be apportioned between the districts, and the cost assessed on the lots and lands in the respective districts in proportion to the benefits accruing thereto.<sup>3</sup>

(1) **Old section 2378 R. S.**, repealed, and see old §§ 2372 and 2379 R. S., repealed.

(2) **Ordinance to construct.—**  
*Time of passage.* An ordinance passed prematurely was held not invalid. Since failure to publish the preliminary resolution is a defect covered by the curative statutes, an ordinance passed before that publication is complete, would not be fatally defective. *Toledo v. Ry. Co.*, 4 C. C. 113.

**Defect in ordinance**, such as omitting to name one of the streets for a sewer, was held to be within the curative provisions. *Davis v. Cincinnati*, 1 B., 104.

**Written notice to owners.—** § 51 of the Code provides certain things that shall be done, where it is deemed necessary to make "any public improvement." § 52 requires

that a notice of the ordinance required in § 51 shall be served on the owners of property to be assessed. The sections of the Code relating to construction of and assessment for sewers as part of a system make no mention of service of written notice. Construction of and assessment for sewers as a part of a sewer system were (under former laws) held to be distinct from other street improvements and hence to have been separately and completely provided for. *Cincinnati v. Wewell*, 16 B. 287; see further *Nitzel v. St. Bernard*, 3 N. P. 317.

(3) **Assessment by districts**, provided for also by former laws, was held not jurisdictional, and an assessment for a sewer in parts of two districts was held valid under previous statutes. *Cincinnati v. Honnigfort*, 32 B. 32.

## FORM OF ORDINANCE AUTHORIZING CONSTRUCTION.

Ordinance No.....

Determining to proceed with the construction of sewers in district.....  
.....[or part of district....., or district consisting of territory bounded.....].

Be it ordained by the council of the city [or village] of....., State of Ohio,

Sec. 1. That it is hereby determined to proceed with the construction of sewers in the district [or districts or part of district] bounded and described as follows: (here copy boundary of district as given in the resolution of necessity), pursuant to a resolution passed on the.....day of ....., 19..., and in accordance with the plans and specifications heretofore prepared by the engineer of said city [or village] for a system of sewerage therein [or in said district], adopted by council on the.....day of....., 19..., and now on file in the office of the auditor of said city [or clerk of said village], and to be of ..... (here insert materials to be used).

Sec. 2. That the cost..... (here repeat mode of payment for the improvement, as determined in the resolution of necessity).

Sec. 3. That the following lots and lands shall be assessed for said improvement, as above determined:

In district.....

| Streets. | Lot Numbers. |
|----------|--------------|
|          |              |

Sec. 4. (In cities) That the board of public service be and hereby is authorized and directed to make and execute a contract for the construction of said improvement with the lowest and best bidder, after advertisement, according to law.

Or,

Sec. 4. (In villages) That the clerk be and hereby is authorized and directed to advertise for bids for the construction of said improvement according to law.

Sec. 5. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed....., 19...

Attest:

.....

Clerk.

.....

President of Council.

**Sec. 86. [How contract let.]** The work shall be advertised, and the contract shall be awarded to the lowest and best bidder, in the manner heretofore provided for the improvement of streets.<sup>1</sup>

(1) See § 59 of the Code. As to changes or alterations in sewer con- tract under former laws, see *Gano v. Eshelby*, 21 B. 177.

**Sec. 87. [Ordinance for assessment of costs; bonds in anticipation of collection of assessments.]** Council may, if it deems expedient, by ordinance assess the real estate as provided in the ordinance to improve, and cause such assessments to be collected, or, at its option, may issue bonds in anticipation of the collection of such assessments, before the work is done or contracted for. Or council may, at its option, delay such assessments until the work is completed, and then, upon the certificate of the engineer showing the completion of the work, by ordinance assess the real estate as provided in the ordinance to improve.<sup>1</sup> Any person so assessed shall have the option of paying his proportion of the assessment in cash within the period of thirty days from the date of the levy thereof upon due notice being given. [1904, March 25, 97 v. 51.]



(1) **Assessment.**—The assessment is to be made as provided in the ordinance to improve and must be levied as other assessments are levied. See § 50 *et seq.*

**Installments.**—It was held that sewer assessments might be made on the installment plan though the section relating to sewers did not expressly so provide. *Nitzel v. St. Bernard*, 3 N. P. 317.

**Miscellaneous.**—The cost of sewers on several streets may be added together and the assessment made equally on all the lands adjacent to the several streets. *Johnson v. Avondale*, 1 C. C. 229.

It was held under former statute that assessing district need not be established in assessment for trunk sewer. *Wilson v. Cincinnati*, 5 N. P. 68.

Street and sewer improvements cannot be assessed in one assessment. *Nitzel v. St. Bernard*, 3 N. P. 317.

As to validity of sewer assessment on property abutting on one side of the street only, see *Toledo v. Beaumont*, 3 N. P. 287.

**Intersections.**—It was held under former laws that the rule that intersections must be paid for by the city does not apply to sewer assessments. *Cincinnati v. Wewell*, 16 B. 287. But see § 53 of the Code.

**Corner lots.**—The corner lot doctrine applies to sewer assessments and corner lots are assessable only for the narrow frontage. *Blanchard v. Columbus*, 35 B. 1; *Cincinnati v. Honnigfort*, 32 B. 32. See generally as to assessment of property abutting on more than one street, *Cincinnati v. Wewell*, 16 B. 287.

#### **Property subject to assessment.**

—Farming property. *Toledo v. Andrews*, 18 C. C. 861.

Wharf property is liable for sewerage. *Boeres v. Strader*, 1 C. S. C. R. 57.

#### **Limitation of assessments.**

The former limitation to percentage of value of land in the general assessment laws was held to apply to sewer assessments. *Cincinnati v. Connor*, 55 O. S. 82. See further § 53 and note "Separate improvements" on page 203.

**What costs and expenses included.**—Assessment held not void because it included the cost of board sheeting used in making the sewer, although the proceedings did not provide for such expense. *Hastings v. Columbus*, 42 O. S. 585. See *Cincinnati v. Anchor White Lead Co.*, 44 O. S. 243.

Assessment cannot include cost of material not in fact used in the sewer construction. *Toledo v. Beaumont*, 3 N. P. 287.

Assessment for house connections up to the line of the street. See *Toledo v. Andrews*, 18 C. C. 861.

Cost of advertising and pay of superintendent may be included. *Cincinnati v. Wewell*, 16 B. 287.

**Defense to assessment.**—*Claiming no benefit.*—No defense to a sewer assessment that the lots were below the level of the sewer or that the sewer was too small and was therefore of no benefit. *City v. McDermott*, 2 B. 240; *Hildebrand v. Toledo*, 27 C. C. 427; 6 C. C. (N. S.) 450; *Ford v. Toledo*, 64 O. S. 92.

No defense to assessment that the sewer was no benefit to property owner's lot, *Conner v. Cincinnati*, 11 C. C. 336. Nor that owner's lot was six feet below the sewer. *Toledo v. Kohn*, 2 N. P. 47; nor that the owner's cellars were deeper than the sewer, *Cincinnati v. Bickett*, 26 O. S. 49; nor that the owner's lot is a wharf on a river bank and is the lowest ground of all, *Boeres v. Strader*, 1 C. S. C. R. 57, 60.

**Defect in proceedings.**—Omission of some of the abutting feet from the assessment is no defense where plaintiff's assessment was not thereby increased. *Wilson v. Cincinnati*, 5 N. P. 68.

See also as to omissions and defects which are not a defense to as-

assessment. *Wewell v. Cincinnati*, 45 O. S. 407, (omission to construct sewer in street embraced in plan); *Toledo v. Railway Co.*, 4 C. C. 113, (failure to provide plans and specifications and estimate of expense); *Cincinnati v. Hionnigfort*, 32 B. 32, (omission of a street in advertising plan); *Davis v. Cincinnati*, 1 B. 104, (omitting to name one of the streets in the ordinance.)

**Uniformity.**—Owner has no defense to assessment because of failure to assess all the abutting lots unless his assessment was thereby increased. His remedy is to enjoin the levy of increased taxes due to failure to make assessment. *Wilson v. Cincinnati*, 5 N. P. 68.

It is no defense to a sewer assessment that other property benefited has not been assessed where it appears that such other property is exempt because already supplied with local drainage. *Toledo v. Potter*, 19 C. C. 661.

**Set-off.**—There can be no set-off against sewer assessment because of material furnished by property owner to contractor. *Wilson v. Cincinnati*, 5 N. P. 68.

**Defense of local drainage.**—See notes to § 53 of the Code.

**Form of assessing ordinance** for sewer improvement may be adapted from form of assessing ordinance under § 55 of the Code, p. 204. And see requirements in § 85 above.

**Sec. 88. [Council may provide for construction of sewers without adopting any plan of sewerage or dividing city into districts.]<sup>1</sup>**

The council may, if in its opinion expedient, provide for the construction of main drains and branch drains connecting therewith without previously adopting any plan of sewerage or division of the territory of the municipal corporation or any part thereof, into districts, and may assess the cost and expense thereof upon such lots or lands as shall be designated in the ordinance to improve, or the same may be paid out of the sewer fund, or by the municipal corporation at large, as council shall determine, and such proceedings shall be had in respect to such improvements and assessments as are provided for in this subdivision for the construction of main or branch sewers according to a previously adopted plan.

(1) **Old section** 2371 R. S., repealed.

**Sec. 89. [Councils of two or more municipalities authorized to construct joint sewers; procedure.]<sup>1</sup>** The respective councils of any two or more municipal corporations shall have power to

provide for the construction of a main sewer and branches jointly by such corporations for the purpose of sewerage and draining such corporations or any part thereof, and to agree upon the plan and location of such main sewer, and the terms and conditions on which the same shall be constructed and maintained for common use, and the portion of the cost and expense thereof to be paid by each corporation. For this purpose said corporations may jointly appropriate land either within or without their respective corporations. The council of each corporation shall provide for assessing such portion of the cost and expenses of constructing any such main sewer or drain as it shall determine to be a proper charge upon the lots and lands within such respective corporations benefited thereby, and the excess over the assessment herein authorized shall be paid out of the sewer fund of the corporations respectively; or if the corporations or either of them are divided into sewer districts, out of the sewer fund of the district or districts directly or indirectly sewerage in whole or in part thereby; and in case more than one district is so sewerage thereby, the council shall apportion the amount to be paid by each district or assessed against the property therein, or the said councils, or either, may determine to place the whole cost, or any part thereof, upon the general duplicate; and bonds may be issued by either or both of said corporations to provide for the payment of the cost and expense thereof as is provided in this subdivision, and the proceedings for the construction of such main sewer or drain, shall, so far as applicable, be conducted according to the provisions of this subdivision. The advertisement for bids for the construction thereof shall be joint, and shall be filed with the clerk of council, and the same shall be reported to the council of each corporation. Any contract made for the construction of such sewer shall be in the names of such corporations jointly, but each corporation shall be



liable only for such portion of the cost and expense as shall be specified in the ordinances providing for the same.

(1) **Old section** (2406-120) R. S., repealed.

**Sec. 90.** [Joint management of such system.]<sup>1</sup> Said main sewer or drain, branches and appurtenances, on completion, shall be the property of said corporations jointly, and said corporations may take all necessary steps to keep the same in proper repair and condition and to protect the same from damage and improper use. Said corporations shall have the power by ordinance jointly passed, to prescribe the terms and conditions, including the price to be paid therefor, upon which other municipal corporations, public institutions or individuals, may connect with and use such main sewer or drain, and the disposition of the fund arising therefrom.<sup>2</sup>

(1) **Old sections.** Compare §§ (2) **Tapping sewers.** See note (2406-146) and (2406-147) R. S., to § 77 of the Code, p. 245. repealed.

**Sec. 91.** [Council may borrow money for construction of sewers.]<sup>1</sup> The council of any city or village shall have power to borrow money, at a rate of interest not exceeding six per centum per annum, to pay the cost and expense of constructing the main sewers, main drains, branches and ditches provided for in this subdivision.

(1) **Old section.**— Compare § 2380 R. S., repealed.

**Sec. 92.** [Council may provide for construction and maintenance of sewer pumping stations, etc.]<sup>1</sup> The councils of cities and villages, in accordance with the provisions of this title, may provide for the construction and maintenance of such sewer pumping stations, and equip the same with the necessary machinery and apparatus and provide the necessary buildings therefor, as the council shall deem necessary.

(1) **Old section.** Compare § (2406-121) R. S., repealed.

**Sec. 93. [Sewage farm.]**<sup>1</sup> Power and authority is hereby granted to any city or village to purchase and hold land outside of the corporate limits, to be used as a sewage farm, to construct and maintain thereon all the necessary appliances for the proper disposition of the sewage of such city or village, under such rules and regulations as shall be prescribed by council and approved by the state board of health.<sup>2</sup>

(1) **Old section.** Compare § —See § 7, paragraphs 19 and 25; (2406-105) R. S., repealed. § 10, paragraph tenth, and § 11 of

(2) **Sewage plants and farms.** the Code.

*(k) Miscellaneous Provisions.*

**Sec. 94. [All assessments subject to certain sections of Revised Statutes.]** All assessments provided for in this act shall be subject to the provisions of sections 2268, 2278, 2279, 2282, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2294, 2295, 2297, 2298, 2299, 2300, 2302, 2318, 2321, 2326, 2327 and 2332 of the Revised Statutes of Ohio, so far as the same may be applicable, and such sections shall be and remain in full force and effect.

**[When special assessments to be certified to county auditor; how collected; when such assessments to be collected by municipal treasurer.]**<sup>1</sup> Whenever any special assessment is made as herein provided, and the same has been confirmed by council and bonds, notes, or certificates of indebtedness of the corporation are issued in anticipation of the collection thereof, it shall be the duty of the clerk of the council,<sup>2</sup> on or before the second Monday in September, annually, to certify such assessment to the county auditor, stating the amounts and the time of payment, and in accordance therewith the county auditor shall place the same upon the tax list,<sup>3</sup> and the county treasurer shall collect the assessment in the same manner as other taxes are collected, and when collected he shall pay the same to the treas-

urer of the corporation to be by him applied to the payment of such bonds, notes, or certificates of indebtedness and interest thereon, and for no other purpose; and for the purpose of enforcing the collection of the assessment the county treasurer shall have the same power and authority now allowed by law for the collection of state and county taxes. In all other cases, such assessment shall be paid to and collected by the treasurer <sup>4</sup> of the municipality, and in any event it shall be the duty of the clerk of the council, when the receipt is presented to him by the owner, showing the payment of any assessment on his property to enter such receipt on the margin of the record of the assessment.

(1) **Old section** 2296 R. S., repealed.

(2) **In cities**, where assessment books may be conveniently kept by the auditor, such installments may be by him reported to the clerk of council and certified by the latter.

(3) **Prima facie valid**.—An assessment on the tax duplicate is presumptively valid and the burden is on the property owner to show invalidity. *Murphy v. Sims*, 13 Dec. 62. See also *Bolton v. Cleveland*, 35 O. S. 319.

**Placing on duplicate**.—Where tract of land is cut in two by improvement, whole assessment must not be put on whole tract on the duplicate, but on separate parcels. *Spangler v. Cleveland*, 35 O. S. 469.

Nor should whole assessment be put on one of the lots. *Younglove v. Hackman*, 43 O. S. 69.

(4) **Paid to treasurer**.—The above provision would seem to forbid assignments of assessments to contractors. But see § 2285 R. S., re-enacted, *infra*.

#### FORM OF CERTIFICATE TO AUDITOR OF ASSESSMENTS.

Office of the Clerk of Council of the City [or Village] of.....  
To the Auditor of.....County, Ohio:

I hereby certify that the special assessments hereinafter set forth have been duly levied by the council of the city [or village] of.....upon the lots and lands described below, and are herewith certified to you, as provided by law to be placed upon the tax list and collected as other taxes are collected:

| Owner | No. and sub-division<br>or other description of lot. | Amount As-<br>sessed. |
|-------|------------------------------------------------------|-----------------------|
|       |                                                      |                       |



Witness my hand and official seal this.....day of....., 19....

(Seal.) Clerk of the Council of the City [or Village] of.....

**Sec. 2268 R. S. [Assessment on owner of life estate.]** When a special assessment is made on real estate subject to a life estate, the assessment shall be payable by the tenant for life; but upon application by the life tenant to a court of competent jurisdiction, by action against the owner of the estate in fee, such court may apportion the cost of the assessment between the life tenant and the owner in fee, in proportion to the relative value of the improvement to their estates, respectively, to be ascertained and determined by the court on principles of equity.<sup>1</sup> [67 v. 80, § 541.]

(1) **In partition case**, the provision of this section will be applied and payments already made properly charged. *Ward v. Ward*, 9 C. C. 454.

proportionate benefit, not actual benefit. *Crawford v. Crawford*, 4 Dec. (Re) 138.

See further *Cook v. Gilpin*, 2 B: 82.

**Apportionment** is according to

**Sec. 2278 R. S. [Notice of assessment to be published.]** Before adopting the assessment so made, the council shall publish notice for three weeks consecutively, in some newspaper of general circulation in the corporation, that such assessment has been made, and that the same is on file in the office of the clerk for the inspection and examination of persons interested therein.<sup>1</sup> [66 v. 248, § 585; (S. & S. 833).]

(1) **Application of section.**—§ 2278 R. S., above, applies to assessments by benefits. This section and 2279 R. S., following, if appropriately placed in the Code, should follow § 68, *supra* (which is substantially a re-enactment of old § 2277 R. S.) and should precede § 69, *supra*. (which is substantially a re-enactment of old § 2280 R. S.). The special method provided for assessments by benefits was formerly contained in §§ 2277, 2278, 2279, 2280, 2281 and 2282 R. S. The new Code repeals §§ 2277 and 2280 and incorporates their provisions in §§ 68

and 69, respectively, omitting the classification of municipalities; repeals the unimportant § 2281, without substituting anything in its place, and then in the final section on assessments (§ 94, *supra*) re-enacts §§ 2278, 2279 and 2282 of the old law of assessments by benefits, together with other sections of the revised statutes governing assessments in general. In the present edition of the Code these sections of the new act and old sections of the revised statutes re-enacted are printed in the order in which they appear in the bill as it

passed the General Assembly. In the matter of assessments by benefit, confusion may be avoided by referring to the "Order of Procedure" given under § 68, *supra*, where the various steps in such assessments and a reference to the laws in force with respect to each may be found.

**Necessity of notice.**—Under former sections it was held that the publication of notice was not a con-

dition precedent to the levying of assessments, where no damages caused by the improvement were included in the assessment. *Finnell v. Kates*, 19 O. S. 405.

**Effect of notice.**—After notice of the assessment is given, all persons interested are bound to take notice of the subsequent proceedings. *Chamberlain v. Cleveland*, 34 O. S. 551.

### FORM OF NOTICE OF ASSESSMENT.

#### Legal Notice.

Notice is hereby given that the estimated assessment of the cost of improving.....street, from.....to....., by (here insert character of improvement), on the lots and lands benefited and to be charged therewith as set forth in a resolution No....., to improve said street, passed....., 19...., has been made and reported to council and said estimated assessment is now on file in the office of the clerk of the city [or village] of....., for the inspection and examination of all persons interested therein.

By order of the Council of the City [or Village] of.....

.....  
....., 19... Clerk.

**Sec. 2279 R. S.** [Objections to assessments to be filed.] If any person objects to the assessment, he shall file his objections, in writing, with the clerk, within two weeks after the expiration of the notice; and thereupon the council shall appoint three disinterested freeholders of the corporation to act as an equalizing board. [66 v. 249, § 586; (S. & S. 833).]

### FORM OF RESOLUTION APPOINTING EQUALIZING BOARD.

Be it resolved by the council of the city [or village] of....., State of Ohio, two-thirds of the members of council concurring,

That....., .....and....., three disinterested freeholders of said city [or village] be, and they are hereby appointed to act as an equalizing board to hear all objections to the estimated assessment heretofore reported to council by the estimating board appointed under a resolution passed on the.....day of....., 19...., of the cost of improving.....street, from.....to.....and to equalize the same as to them seems proper, in accordance with law.

Said board shall meet for the above purpose at.....(insert place)

on the.....day of....., 19...., at....M., and upon the completion of such equalization shall report such equalized assessment to council<sup>1</sup>.

Passed....., 19....

Attest:

.....  
Clerk.

.....  
President of Council.

**Sec. 2282 R. S.** [Concurrence of two-thirds requisite to appoint board.] A concurrence of two-thirds of the members of the council shall be necessary in appointing the equalizing board, and in confirming its assessment. [66 v. 249, § 589.]

**Sec. 2284 R. S.** [Cost of any improvement shall include what.] The cost of any improvement contemplated in this chapter shall include the purchase money of real estate, or any interest therein, when the same has been acquired by purchase, or the value thereof as found by the jury, where the same has been appropriated, the costs and expenses of the proceeding, the damages assessed in favor of any owner of adjoining lands and interest thereon,<sup>1</sup> the costs and expenses of the assessment, the expense of the preliminary and other surveys, and of printing, publishing the notices and ordinances required, including notice of assessment, and serving notices on property owners, the cost of construction, interest on bonds, where bonds have been issued in anticipation of the collection of assessments, and any other necessary expenditure,<sup>2</sup> [1886, May 15; 83 v. 171, 172; Rev. Stat. 1880; 66 v. 241, § 544.]

(1) **Costs of appropriation.**—The cost of land appropriated for an improvement and the costs and expenses of the appropriation proceedings cannot now be assessed on abutting property. See *Dayton v. Bauman*, 66 O. S. 379; *C. L. & N. Ry. v. Cincinnati*, 62 O. S. 465; *Youngstown v. Bonnell*, 65 O. S. 575; *Dodsworth v. Cincinnati*, 18 C. C. 288; *Rhoades v. Toledo*, 6 C. C. 9; *Carlisle v. Cincinnati*, 8 C. C. (N. S.) 46.

For former cases *contra*, see *Cleveland v. Wick*, 18 O. S. 303; *Westwood v. Dater*, 23 B. 291; *Straus v. Cincinnati*, 24 B. 422; *Norwood v. Ogden*, 18 C. C. 869; *Krumberg v. Cincinnati*, 29 O. S. 69; *Meissner v. Toledo*, 31 O. S. 387; *Otis v. Cleveland*, 1 Clev. 91.

**Damages to abutting property** for change of grade cannot be in-

cluded in the assessment. *McGlynn v. Toledo*, 22 C. C. 34 (affirmed, 47 B. 712); *Freeman v. Hunter*, 7 C. C. 117; *Fridman v. Norwood*, 1 C. C. (N. S.) 97; 25 C. C. 258; *Bartley v. Cincinnati*, 8 C. C. 226. Cases *contra*, *McMakin v. Cincinnati*, 7 N. P. 203; *Corry v. Cincinnati*, 22 B. 194.

Or the cost of grading or lowering the street to the new grade. *Carlisle v. Cincinnati*, 8 C. C. (N. S.) 46; *Thale v. Cincinnati*, 10 Cin. Court Index. No. 103.

(2) **What costs and expenses included.**—Expense of a retaining wall along street, *Longworth v. Cincinnati*, 34 O. S. 101; cost of lateral and cross drain pipes, *Id.*; compensation of superintendent of work, but not compensation for services of salaried officers, *Id.*;



small additional expense necessary to make the improvement a good job, as placing a French drain in street, or increasing width of improvement, though not provided for in the ordinance to improve, etc., *Hastings v. Columbus*, 42 O. S. 585; *Taylor v. Wapakoneta*, 26 C. C. 285; amount retained as guaranty of good work, but not if retained for repairs, *Fridman v. Norwood*, 1 C. C. (N. S.) 97; 25 C. C. 258, (aff'd, 49 B. 99); necessary sheeting in a trench, not before provided for, *Cincinnati v. Anchor White Lead Co.*, 44 O. S. 243; cost of broken stone beyond that called for in contract, *Cincinnati v. Goodman*, 5 Rec. 153; expense of curbing, included in street assessment, *Ehni v. Columbus*, 3 C. C. 494; fees of equalizing board, *Chamberlain v. Cleveland*, 34 O. S. 551, 569; expense of grading approaches on intersecting streets, *Butler v. Toledo*, 5 O. S. 225; *Creighton v. Scott*, 14 O. S. 438; expense of advertisement in more than one newspaper, although statute provides for "advertisement in some newspaper," *Cincinnati v. Davis*, 58 O. S. 225, 237; *Fridman v. Norwood*, 1 C. C. (N. S.) 97; 25 C. C. 258 (aff'd, 49 B. 99); additional cost of retaining wall, *McMakin v. Cincinnati*, 7 N. P. 203; interest on installments, *Steese v. Oviatt*, 24 O. S. 248; interest from time fixed for payment, when assessment defective, but amount properly chargeable equals assessment, *Gest v. Cincinnati*, 26 O. S. 275; interest on amount justly due from the time the court found it, but not earlier, in the ordinary case, *Burkhardt v. Cincinnati*, 7 C. C. 260; *Fricke v. Cincinnati*, 1 N. P. 98.

The fact that preliminary expenses, such as cost of advertising, serving notices, etc., have been paid out of the general funds of the mu-

nicipality, does not prevent such expenses from being lawfully included in the assessment, to reimburse the general fund. *Adkins v. Toledo*, 27 C. C. 417; 6 C. C. (N. S.) 433.

Municipality does not have to deduct from assessment the difference between interest which it has to pay on its bonds and interest which property owner pays the city. *Borger v. Columbus*, 3 N. P. (N. S.) 261; 15 Dec. 476; 27 C. C. 812; 6 C. C. (N. S.) 401. See Code, § 100, as to deduction under former statutes; see *Fridman v. Norwood*, 25 C. C. 258; 1 C. C. (N. S.) 97; *Mudge v. Evanston*, 7 C. C. (N. S.) 197.

**Items which cannot be included.**—Compensation for services of salaried officers, *Cincinnati v. Longworth*, 34 O. S. 101; cost of repair of bad work, *Spangler v. Cleveland*, 35 O. S. 469; *Watterson v. Bradley*, 43 O. S. 456; percentage to pay collector's fees, *Jonas v. Cincinnati*, 18 O. S. 318; *Spangler v. Cleveland*, 35 O. S. 469; expenses for advertising, etc., where void assessment is enforced on ground of estoppel, *Corry v. Gaynor*, 22 O. S. 584, 597; interest on bonds which make the assessment exceed the percentage of value of property allowed by law, *Salem v. Mulford*, 22 C. C. 397 (affirmed, 62 O. S. 632); fees for service of notice in excess of lawful amount, *McGlynn v. Toledo*, 22 C. C. 34 (affirmed, 47 B. 712); item of expense not in estimate, whether to be included, see *Knorr v. Cincinnati*, 21 B. 297 (affirmed without report, 24 B. 371).

**Determination of council** that an item of expense is properly to be included is not conclusive. *Reynolds v. Clearwater*, 4 Gaz. 129.

**Additional advertising, etc.**, is not necessary to allow items properly included in necessary expenditures to be included in assessment. *Hastings v. Columbus*, 42 O. S. 585.

## Sec. 2285 R. S. [When payable; lien of; release of such lien.]<sup>1</sup>

Special assessments shall be payable by the owners<sup>2</sup> of the property assessed personally, by the time stipulated in the ordinance providing for the same, and shall be a lien from the date of the assessment upon the respective lots or parcels of land assessed,<sup>3</sup>

and it shall be the duty of the city clerk, whenever presented with a receipt from the contractor <sup>4</sup> in whose favor an assessment is confirmed, or his assigns showing said assessment on any property for any improvement to have been paid, to at once record said fact upon the margin of the record of said assessment, together with the date of such presentation, from which time said property shall be released from the lien aforesaid. [90 v. 50; 66 v. 242, § 545.]

(1) **Object of section** is not to define property liable to assessment, but to prescribe the time when the assessment becomes a lien on the property and charge against the owner. *Douglass v. Cincinnati*, 29 O. S. 165; *Cincinnati v. Oliver*, 31 O. S. 371.

**Validity** of statutes creating personal liability for assessments sustained. *Hill v. Higdon*, 5 O. S. 243; *Gest v. Cincinnati*, 26 O. S. 275.

(2) **Owners.**—Lessee for ten years is not an owner within meaning of this section. *Davis v. Cincinnati*, 36 O. S. 24.

Those who were owners at the time of the assessment are liable to personal judgment. *Toledo v. Barnes*, 8 C. C. 684, 687.

Holder of perpetual lease with privilege of purchase is an "owner." *Clements v. Norwood*, 32 B. 201.

(3) **Lien.**—The assessment on property is a lien prior to a mortgage or judgment. *Moerlein Brew. Co. v. Westmeier*, 4 C. C. 296. But see *Donohue v. Brotherton*, 7 N. P. 367.

It is superior to a purchase money mortgage. *Clifton v. Cincinnati*, 3 B. 272.

Lien is for the present value of whole amount, although the assess-

ment is payable in installments. *Moerlein Brew. Co. v. Westmeier*, 4 C. C. 296.

A covenant against all claims whatsoever, would include a lien for assessments. *Craig v. Heis*, 30 O. S. 550.

Assessment becomes a lien from the date of the passage of the assessing ordinance. *Whipple v. Toledo*, 7 C. C. (N. S.) 520.

The lien of municipality on real estate for assessments remains on such real estate unaffected by sales and transfers and can be collected as other taxes. Where the property is sold under judicial process, the city need not and should not be made a party. Installments payable at the time and upon the annual duplicate, must be paid out of the proceeds of the sale, and other installments will continue a lien to be paid by the purchaser. *Makley v. Whitmore*, 61 O. S. 587, 595; *Hagerty v. Columbus*, 14 Dec. 1.

Property owners, whose property has been appropriated by the municipality, are liable for remaining installments of street assessment levied on the property. *Cincinnati v. Burnet*, 3 O. L. R. 572.

Where land on which there is an assessment lien is divided into parcels and sold, the separate parcels are liable for the liens in the inverse order of sale. *Cincinnati v. Wynne*, 19 C. C. 747 (aff'd, 65 O. S. 611).

(4) **Payment to contractor.**—See § 94 of the Code and note (4) thereunder, p. 259.

**Sec. 2286 R. S. [Assessment and penalty recovered by suit.]**  
If payment is not made by the time stipulated, the amount assessed, together with interest, and a penalty of five per cent. thereon,<sup>1</sup> may be recovered by suit<sup>2</sup> before a justice of the peace, or other court of competent jurisdiction, in the name of

the corporation, against the owner or owners,<sup>3</sup> but the owner shall not be liable, under any circumstances, beyond his interest in the property assessed, at the time of the passage of the ordinance or resolution to improve.<sup>4</sup> [66 v. 242, § 546.]

(1) **Interest.**—See note (2) to § 2284 R. S., *supra*, p. 263.

**Penalty.**—No penalty can be collected where the assessment is not conclusive, because of irregularities. *Upington v. Oviatt*, 24 O. S. 232. See also *Pike v. Cummings*, 36 O. S. 213.

If judgment was entered without including penalty, and without objection, no penalty will afterwards be awarded. *Evans v. Cincinnati*, 3 B. 856.

Where judgment is reversed and larger amount assessed, court cannot remit penalty. *Finnell v. Howell*, 2 C. S. C. R. 150, 155.

Where court reduces assessment because beyond statutory limit, no penalty can be recovered. *Cincinnati v. Fugman*, 5 N. P. 14.

Penalty is due and payable although no suit is brought. *Toledo v. Platt*, 2 N. P. 304; and a tender must include interest and penalty. *Id*

(2) **Action to collect.**—When assessment certified to auditor and put on the tax duplicate the action to collect by city does not lie. *Fremont v. Hayes*, 4 N. P. 379. Such action can be brought only by the County Treasurer. *Ry. Co. v. Belaire*, 47 B., 865.

**Personal judgment.**—Statute making lot owners personally liable is constitutional. *Gest v. Cincinnati*, 26 O. S. 275. But no personal liability exists unless the statute expressly imposes it. *Dreake v. Beasley*, 26 O. S. 315.

Personal liability exists only in case of one owning the lot at the date of the assessment and petition

must aver ownership at that time. *Corry v. Gaynor*, 21 O. S. 277.

Personal judgment cannot be had against one in possession who is not an owner. *Davis v. Cincinnati*, 36 O. S. 24.

See further *Lowden v. Cincinnati*, 2 Disney, 203.

**Limitation on suit.**—Statute of limitations runs not from date of assessing ordinance but from time fixed for payment. *Reynolds v. Green*, 27 O. S. 416; the limitation is six years. *Id*. As to whether statute of limitations applies to right to collect assessment, see *Brenchweh v. Drake*, 31 O. S. 652; *Hartman v. Hunter*, 56 O. S. 175; *Linn St. Bldg. Ass'n v. Morgan*, 47 B. 889; *Wastenev v. Schott*, 58 O. S. 410.

**Defenses.**—No defense to suit to collect assessment, that city has not yet paid the money. *Bliss v. Kraus*, 16 O. S. 54; nor that proper plan for improvement was not adopted. *Toledo v. Grasser*, 7 N. P. 396.

**No set-off** to the assessment can be allowed because of damages to property claimed by defendant, *Ulm v. Cincinnati*, 7 N. P. 278; nor because of injury to defendant by slipping on improperly made street. *Shroder v. Overmann*, 5 N. P. 392; and see *Straus v. Cincinnati*, 23 B. 359; nor for claim for materials furnished to contractor, *Wilson v. Cincinnati*, 5 N. P. 68; nor for claim against contractor for digging more material from lot owner's property than licensed to take, *Hastings v. Columbus*, 42 O. S. 585.

**Reduction** for repairs made necessary by bad work should be made



from the assessment. *Hastings v. Columbus*, 42 O. S. 585.

Money received by municipality for rent of tools need not be deducted from assessment. *McGlynn v. Toledo*, 22 C. C. 34 (affirmed, 47 B. 712.)

**Pleading, practice and evidence.**

—Averment of "due passage" of resolution is sufficient on demurrer, though two-thirds vote for passage be required. *Jessing v. Columbus*, 1 C. C. 90. See also *Burns v. Paterson*, 2 H. 270.

Answer denying that requisite number petitioned for improvements needs no reply. *Corry v. Campbell*, 25 O. S. 134, 140.

Where claim has already been adjudged a lien on the property, no question on demurrer can arise as to validity of improvement or statute of limitations. *Columbus v. Schneider*, 12 C. D. 781.

Jury trial, whether necessary. *Norris v. Casper*, 8 N. P., 475, 476.

Where assessments have exceeded benefits the trial court, in action to

collect, may, upon proper pleadings determine what amount should be assessed; and court may also set aside the assessment and remit the question of amount to city authorities. *Walsh v. Sims*, 65 O. S. 211.

Burden of proof is on plaintiff to show assessment exceeded benefits, when this is the defense. *Yost v. Railway Co.*, 24 C. C. 169; 2 C. C. (N. S.) 519. As to costs, see *Ib.*

**Recovery back.**—*Voluntary payment*, what is, see *Marietta v. Slocomb*, 6 O. S. 471; *Whitbeck v. Minch*, 48 O. S. 210; *Stephan v. Daniels*, 27 O. S. 527; *Groesbeck v. Cincinnati*, 51 O. S. 365; *Cincinnati v. James*, 55 O. S. 180.

*Limit of time* for recovery back, is one year, by § 5848 R. S. See *Groesbeck v. Cincinnati*, 51 O. S. 365.

**Injunction against assessments.**

—See notes to § 50 of the Code.

(3) See note to § 2285 R. S., *supra*.

(4) **Limit of liability** applies even where owner is one of three-fourths of property owners who petitioned for improvement and asked all costs to be placed on them. Personal judgment cannot exceed the value of the property. *Laird v. Cincinnati*, 5 B. 903; 9 Rec. 479.

**Sec. 2287 R. S.** [Lien may be enforced against all owners, or a part, etc.] Proceedings for the recovery of the assessment may be instituted by the corporation against all the owners, or each or any number of them; or to enforce the lien, against all the lots or lands, or each lot or parcel, or any number of them embraced in any one assessment; but the judgment or decree shall be rendered severally or separately for the amount assessed; and any proceeding may be severed, in the discretion of the court, for the purpose of trial, review, or appeal where an appeal is allowed.<sup>1</sup> [66 v. 242, §§ 547, 549.]

**(1) Enforcement of lien.**—

Lands of cemetery association exempt from taxation cannot be sold to pay assessment, but assessment may be enforced by such remedy as courts of equity afford. *Lima v. Cemetery Ass'n*, 42 O. S. 128.

Municipality cannot enforce lien after assessment has been certified to county auditor. *Fremont v. Hayes*, 4 N. P. 379.

Municipality may buy in property on which it has a lien. *City v. Schneider*, 7 N. P. 619.

**Sec. 2288 R. S.** [Lien as to non-resident owner.] In proceedings to enforce the lien, when the owner of any lot or land assessed is a non-resident of the state, or is unknown, notice shall be given by publication in the manner prescribed by law in similar cases.<sup>1</sup> [66 v. 242, § 548.]

**(1) Manner of Publication.—**

See §§ 5046, 5047, 5048 and 5049 R. S.

**Sec. 2289 R. S.** [Costs, in case of error or defect in proceedings.]<sup>1</sup> If, in any such action it shall appear that by reason of any technical irregularity or defect—whether in the proceedings of the board of improvements, or of the council, or of any other officer of the corporation, or in the plans or estimates—the assessment has not been properly made against any defendant or upon any lot or parcel of land sought to be charged,<sup>2</sup> the court may nevertheless on satisfactory proof that expense has been incurred which is a proper charge against such defendant, or lot or parcel of land in question, render judgment for the amount properly chargeable against such defendant or on such lot or land,<sup>3</sup> but in such cases the court shall make such order for the payment of the costs as may be deemed equitable and proper.<sup>4</sup> [1883, March 9: 80 v. 52; Rev. Stat. 1880; 66 v. 242, § 550.]

**(1) Validity.**—§ 2289 R. S. providing for judgment where assessment is invalid because of irregularities was held not a violation of the United States Constitution. *Railway v. Columbus*, 23 B. 3.

**(2) What irregularities cured.**—Irregularity in notice of resolution and ordinance to improve, *Green v. Cincinnati*, 7 C. C. 233; irregularity in estimate of cost of improvement, *Wewell v. Cincinnati*, 45 O. S. 407; as to what defects in advertisement are cured, see *Wilder v. Cincinnati*, 26 O. S. 284, 285, *Cincinnati v. Goodman*, 5 Rec. 153; publication of notice on Sunday, *Hastings v. Columbus*, 42 O. S. 535; defective advertisement for bids, see *Cincinnati v. Bickett*, 26 O. S. 49; ordinance to

improve passed before time has expired for filing claim, *Toledo v. Railway*, 4 C. C. 113; failure to advertise for bids for full time required, *Upington v. Oviatt*, 24 O. S. 232; see also where rate of assessment not uniform on all property assessed, *Jaeger v. Burr*, 36 O. S. 164; part of street where sidewalks laid not being brought up to grade, *McGlynn v. Toledo*, 22 C. C. 34, *aff'd* 47 B., 712; unlawful combination among bidders (in such case property owners may obtain a reduction to the extent of actual injury), *Hubbard v. Norton*, 28 O. S. 116; lowest bidder released at his own request, *Cincinnati v. Goodman*, 5 Rec. 153.

Lowest bid not taken from mistake in judgment, assessment

collectible up to fair value of work, *Cincinnati v. Hopple*, 1 B. 104; no plans and specifications on file when contract made, *Becher v. McCloud*, 4 C. C. 305; advertisement for bid not as required, *Ib.*; in such case the reasonable cost is recoverable, *Ib.*

Assessment ordinance requiring payment at date earlier than its passage is an error that can be cured. *Bolton v. Cleveland*, 35 O. S. 319.

**Defects not cured.**—Failure to pass improvement ordinance as required by law, *Sullivan v. Pausch*, 5 C. C. 196; omission to publish preliminary resolution, *Welker v. Potter*, 18 O. S. 85; but see *Upington v. Oviatt*, 24 O. S. 232; failure to pass assessment ordinance, *Brewer v. Bowling Green*, 7 C. C. 489; failure to serve land owners with notice of ordinance to improve, *Joyce v. Barron*, 67 O. S. 264, 268; but see *Toledo v. McMahon*, 9 C. C. 194; *Kirby v. Winton Place*, 7 N. P. 169; omission of notice of resolution declaring necessity to improve, *Schmidt v. Elmwood Place*, 15 C. C. 351; *Welker v. Potter*, 18 O. S. 85; *Stephan v. Daniels*, 27 O. S. 527; *Knecht v. Cincinnati*, 18 C. C. 875; see also *Kelly v. Cleveland*, 34 O. S. 468. (Property assessed which was not included in ordinance); collusion between city officers and contractor, *Cincinnati v. Kemper*, 17 B. 116; work done before any determination to assess, *Folz v. Cincinnati*, 2 H. 261.

(3) **Amount properly chargeable.**—As to ascertainment of such amount, see *Wilder v. Cincinnati*, 26 O. S. 284; *Cincinnati v. Bickett*, 26 O. S. 49; *Central O. R. R. Co. v. Columbus*, 23 B. 3.

Court may allow interest from time assessment due on amount properly chargeable. *Gest v. Cincinnati*, 26 O. S. 275. See further *McCloud v. Columbus*, 54 O. S. 439, where this section was applied.

Where assessment covers more feet than defendant owns, court may reduce amount proportionately. *Ridenour v. Saffin*, 1 H. 464, 478.

When illegal items are included in the assessment, city need not re-assess, but court may correct assessment. *Dodson v. Cincinnati*, 4 Rec. 312.

Amount chargeable is not amount of benefits but that part of the assessment that should have been charged, if assessment had been legally made. *Cincinnati v. Bickett*, 26 O. S. 49. It is based on the fair average cost and not the cost in front of each lot. *Wilder v. Cincinnati*, 26 O. S. 284.

But, though court can correct assessment, it cannot make an entirely new assessment, as council is authorized to do by § 2290 R. S. *Mocker v. Cincinnati*, 7 N. P. 279.

As to right of court to fix amount properly chargeable, where assessment improperly made, not because of technical error, but because in excess of benefits, etc., see note 2 under § 53 of the Code, p. 202.

**Jury trial.**—Under § 2289 giving the court power to determine the amount properly chargeable and award judgment therefor, the issue is not one triable by a jury but by the court. *R. R. Co. v. Bellaire*, 60 O. S. 301.

**Applies to injunctions.**—Where property owner sues to enjoin collection of assessment, § 2289 R. S. applies and court may fix amount properly chargeable.

Where plaintiff in such case admits that part is due he must tender such part before he can have injunction. *Griswold v. Pelton*, 34 O. S. 482.

(4) **Costs of a suit to reduce assessment** should fall on municipality. *Burkhardt v. Cincinnati*, 7 C. C. 260, 262.



**Sec. 2290 R. S. [When re-assessment may be ordered.]** When it appears to the council that a special assessment is invalid, by reason of informality or irregularity in the proceedings, or when an assessment is adjudged to be illegal, by a court of competent jurisdiction, the council may order a re-assessment, whether the improvement has been made or not.<sup>1</sup> [66 v. 242, § 551.]

(1) **Right to re-assess.**—If property which ought to have been assessed is omitted, the assessment will be enjoined, but the right to make re-assessment will not be prejudiced. *Upton v. Oviatt*, 24 O. S. 232.

A re-assessment may also be made where the action of the equalization board is unauthorized. *Chamberlain v. Cleveland*, 34 O. S. 551.

Where an assessment was held void because the city put an assessment at one rate on abutting property and another assessment at a different rate upon lots declared to be specially benefited, the right to re-assess was held not to be prejudiced. *Akron v. Allen*, 22 B. 260.

Where a contractor was unable to recover an assessment because part of the work was enjoined, but recovered the amount from the city, the city could, on the removal of the injunction and completion of the work, reimburse itself by a re-assessment. *Cincinnati v. Wilder*, 9 Rec. 727.

The right to make a proper re-assessment is not prejudiced where an assessment is held illegal because the ordinance to improve a street provides for assessment by the front foot, while the assessment

of damages to the abutters was by benefits. *Dick v. Toledo*, 5 C. D. 157; 11 C. C. 349.

The curative sections apply and a re-assessment may be had, if an assessment is void because made on a wrong basis. *Frey v. Findlay*, 7 C. C. 311, 327.

A re-assessment is valid, even though a portion of the money thereby derived is used for the extension of the improvement beyond the limits designated. *Butler v. Toledo*, 5 O. S. 225, 230.

When re-assessment is precluded: See *Kelly v. Cleveland*, 34 O. S. 468.

**Who may re-assess.**—The right to re-assess lies with council, and a court has no power to order a re-assessment. *Mocker et al. v. Cincinnati*, 4 Dec. 161; 5 N. P. 242.

It is not error for the court to refuse to set aside an assessment and submit the question to the city authorities for re-assessment, where the assessment made by the city exceeds in a substantial amount the special benefits conferred, and the trial court may, upon proper pleadings, determine the amount to be assessed. *Walsh v. Sims, Treasurer*, 65 O. S. 211.

**Sec. 2291 R. S. [Proceedings upon re-assessment.]** Proceedings upon a re-assessment, and for the collection thereof, shall be conducted in the same manner as is provided for the original assessment. [66 v. 242, § 552.]

**Sec. 2294 R. S. [Special duty of courts.]** The court of common pleas and superior courts shall have the jurisdiction authorized by this chapter for the collection of any charge or debt, or the enforcement of any lien, notwithstanding the amount involved shall be less than that to which the jurisdiction is limited in other cases; and those courts may make such special rules concerning the class of cases authorized to be brought under this chapter as will tend to expedite their disposition, and prevent unnecessary costs. [66 v. 242, § 553.]

**Sec. 2295 R. S. [Unpaid assessments to be certified to auditor.]** The council may order the clerk or other proper officer of the corporation to certify any unpaid assessment or tax to the auditor of the county in which the corporation is situated, and the amount of such assessment or tax so certified, shall be placed upon the tax-list by the county auditor,<sup>1</sup> and shall, with ten per cent. penalty<sup>2</sup> to cover interest and cost of collection, be collected with and in the same manner as state and county taxes, and credited to the corporation; provided, that the said ten per cent. penalty shall in no case be added unless at least thirty days shall intervene between the date of the publication of the ordinance making the levy and the time of certifying the same to the county auditor for collection.<sup>3</sup> [1883, March 7: 80 v. 52; Rev. Stat. 1880; 66 v. 243, § 554.]

(1) **Section construed.**—See R. Co. v. Sullivan, 32 O. S. 152.

**Placing on duplicate.**—Where assessment had been assigned to contractor it could not be placed on tax duplicate. Horn v. Columbus, 1 C. C. 337.

Where assessment has been certified to auditor, municipality cannot then collect by suit. Fremont v. Hayes, 4 N. P. 379.

Only county treasurer can sue. Ry. Co. v. Bellaire, 67 O. S. 297.

County auditor not entitled to compensation for preparing a special delinquent assessment duplicate. Marshall v. Wooster, 38 B. 170.

(2) **Penalty** cannot be collected

if assessment not paid in time because defective. Upington v. Oviatt, 24 O. S. 232.

See further, Hartman v. Hunter, 8 C. C. 623.

(3) **New provisions of code.**—See § 94 of the Code, which provides that *whenever bonds are issued in anticipation of the collection of assessments, all such assessments (except, of course, those paid in cash) shall be certified to the county auditor and collected as other taxes. In all other cases assessments are collected by the treasurer of the municipality, and these, if unpaid, may be certified as provided in § 2295 R. S., above.*

**Sec. 2297 R. S. [Duration of lien, etc.]** The lien of an assessment<sup>1</sup> shall continue two years from the time the same is payable, and no longer,<sup>2</sup> unless the corporation shall, before the

expiration of the time, have caused the same to be certified to the auditor of the proper county, for entry upon the tax-list, for collection,<sup>3</sup> or shall have caused the proper action to be commenced in some court having jurisdiction thereof, to enforce such lien against such lots or lands, in which case the lien shall continue in force so long as such assessment remains on the tax-list uncollected or so long as such action is pending, and any judgment obtained, under and by virtue thereof, remains in force and unsatisfied. [66 v. 243, § 556; (S. & S. 837).]

(1) **Lien distinguished** from that given by § 1104 R. S. *Hartman v. Hunter*, 8 C. C. 623. on its face that the two years have elapsed it is demurrable. *Bonte v. Taylor*, 24 O. S. 628.

(2) **Suit by municipality** to collect must be brought within the two years and where petition shows (3) **Limitation of actions** to collect assessments. See note to § 2286 R. S., *supra*, p. 265.

**Sec. 2298 R. S.** [When new action may be commenced.] If an action is commenced within due time, and a judgment therein for the plaintiff is reversed, or if the plaintiff fails in such action otherwise than upon the merits, and the time limited for the same has expired, [a new action may be commenced with-] in one year after such reversal or failure. [66 v. 243, § 557.]

**Sec. 2299 R. S.** [Collection of assessment in advance.] The council may, if it deems expedient, cause the assessments to be collected before the work is done or contracted for. [66 v. 243, § 558.]

**Sec. 2300 R. S.** [Deficiency or excess of assessments.] If an assessment proves insufficient to pay for the improvement and expenses incident thereto, the council may, under the limitations prescribed for such assessment, make an additional pro rata assessment to supply such deficiency; and in case a larger amount is collected than is necessary, the same shall be returned to the persons from whom it was collected, in proportion to the amounts collected from such persons respectively; but this section shall be subject to the limitations contained in other sections of this chapter. [66 v. 243, § 559.]

**Sec. 2302.** [Added territory.] The provisions of this chapter shall embrace territory added to the corporation by annexation or otherwise. [66 v. 244, § 561.]

**Sec. 2318.** [Proceedings of jury.]<sup>1</sup> The jury shall be sworn to inquire into and assess the actual damages in each case separately, under such rules and instructions as shall be given it by the court; and when the jury cannot agree, it may be dis-



charged; but the court may receive its verdict as to one or more of the claimants, and discharge it with respect to parties concerning whose claims it cannot agree; and in case of the discharge of the jury because of disagreement as to any or all of the claims, a new jury shall be summoned, and the same proceedings shall be had, with respect to the claims concerning which there was no verdict, as on the original trial. [66 v. 246, § 567; (S. & C. 1545).]

(1) **Application of section.**— This section refers to proceedings to assess damages caused by improvements, and should follow § 56 of the Code, *supra*.

**Sec. 2321 R. S. [Assessment after completion of improvement.]**<sup>1</sup>  
In all cases where the council determines to assess the damages after the completion of any improvement provided for by this chapter, for which a claim for damages has been filed as hereinbefore provided, the mayor or solicitor shall, within ten days after the completion of such improvement, make written application to the court of common pleas, or a judge thereof in vacation, or to the probate court of the county in which the corporation, or the larger part thereof, is situated, to summon a jury, in the manner pointed out in chapter three of this division,<sup>2</sup> to assess the amount of damage in each particular case; and such court or judge shall fix the time and place of inquiry, and the assessment of damages, in the manner hereinbefore provided. [67 v. 82, § 570.]

(1) **Application of section.**— This section refers to the assessment of damages caused by improvements, when such damages are to be ascertained after improvements are made. If placed in appropriate order it should follow § 58 of the Code, *supra*.

(2) **Sections referred to.**— This refers to the chapter in the Revised Statutes on the appropriation of property by municipalities, now superseded by §§ 10 to 22 inclusive of the Code, *supra*.

**Sec. 2326 R. S. [Time allowed before suit can be brought.]**  
No person who claims damages, arising from any cause, shall commence a suit therefor against the corporation until he files a claim for the same with the clerk of the corporation, and sixty days elapse thereafter, to enable the corporation to take such steps as it may deem proper to settle or adjust the claim; but this provision shall not apply to an application for an injunction, or other proceeding to which it may be necessary for such applicant to resort in case of urgent necessity.<sup>1</sup> [66 v. 247, § 575; (S. & C. 1541).]

(1) **Damages for personal injury** are not included within the words "damages arising from any cause" and claims for such damages need not be filed. *City v. Davis*, 43 O. S. 447.

**Where no notice received**, of resolution to improve, property owner is not barred from commencing a suit for damages. *Jacobs v. Cincinnati*, 2 N. P. 283.

**Sec. 2327 R. S. [Construction of provisions.]** Proceedings with respect to improvements shall be liberally construed by the councils and courts, to secure a speedy completion of the work, at reasonable cost, and the speedy collection of the assessment after the time has elapsed for its payment, and merely formal objections shall be disregarded; but the proceedings shall be strictly construed in favor of the owner of the property assessed or injured, as to the limitations on assessment of private property, and compensation for damages sustained.<sup>1</sup>

(1) **Applied.**—*Cincinnati v. Sherrick*, 47 O. S. 217, 222; *Connor v. Cincinnati*, 11 C. C. 336 (affirmed, 55 O. S. 82).

**Sec. 2332 R. S. [Construction of sidewalks on one side only; upon other side.]** If the board of public works, board of administration, board of city affairs, board of improvements,<sup>1</sup> council or trustees of any municipal corporation deem it necessary to construct a sidewalk or gutter on one side only of any street, alley, turnpike or plank road with proper crossings from one side to the other, it shall be lawful to assess and collect the charge for constructing or repairing such sidewalk, gutter and crossings on the owners of the lots or lands abutting on both sides of such street, alley or road in like manner as if such sidewalk and gutter had been constructed on both sides; but when a sidewalk or gutter is so constructed, if it is deemed necessary to construct a sidewalk or gutter on the other or corresponding side of such street, alley or road, the charge therefor shall also be assessed on the owners of the lots and lands on both sides.<sup>2</sup> [90 v. 213; 89 v. 392; 66 v. 250, § 594; (S. & S. 838).]

(1) **Interpretation.**—This must be taken to mean such board only as is given authority in sidewalk improvements by the Code.

(2) **Ordinance unreasonable.**—Where an ordinance provides for constructing a sidewalk on one side only, leaving no space for sidewalk on other side and assessing cost on both sides, it is unreasonable. *Mills v. Norwood*, 26 B. 348, 6 C. C. 305.

SIXTH. POWER TO BORROW MONEY.<sup>1</sup>*(a) General Provisions.*

**Sec. 95. [Power of municipality to borrow money and issue certificates of indebtedness therefor, in anticipation of general revenue fund; limitation.]**<sup>2</sup> All municipal corporations shall have power to borrow money<sup>3</sup> and issue certificates of indebtedness therefor, signed as municipal bonds are signed, in anticipation of the general revenue fund in any fiscal year, but no loans shall be made exceeding the amount of taxes and revenues estimated to be received at the next semi-annual settlement of tax collections for said fund, after deducting all advances. The sums so anticipated shall be deemed as appropriated for the payment of the certificates at maturity. Such certificates of indebtedness shall not run for a longer period than six months, nor bear a greater rate of interest than six per cent., nor be sold for less than par with accrued interest.

**[Power of municipal corporation to issue bonds in anticipation of special assessments.]** Municipal corporations shall likewise have power to issue bonds in anticipation of special assessments,<sup>4</sup> and such bonds may be in sufficient amount to pay the estimated cost and expense of the improvement for which such special assessments are levied, and in the issuance and sale of such bonds the municipality shall be governed by all the restrictions and limitations with respect to the issuance and sale of other bonds, and the assessments as paid shall be applied to the liquidation of said bonds.<sup>5</sup>

(1) **Chapter of Revised Statutes** relating to the power to borrow money and issue bonds was Chap. 2, Div. 9, Title XII R. S., §§ 2700 to 2711-28. inclusive. Of these sections, all are expressly repealed except §§ 2701, 2703, 2706, 2707 and

2708, which are re-enacted, and § 2709, which is entirely superseded by § 97 of the Code.

(2) **Old sections** 2700 R. S. (loan in anticipation of revenue), 2704 R. S. (borrowing money in anticipation of special assessments),



and 2705 R. S. (bonds for money borrowed in anticipation of special assessments), all repealed.

(3) **Power to borrow.**—In the absence of restrictions a municipality has implied power to borrow money to carry into effect other powers granted. *Bank v. Chillicothe*, 7 O. (2nd pt.) 31. But see *Dunham v. Opes*, 3 C. C. 274, 282, where it is said that this doctrine does not apply where there are restrictions, as now exist in Ohio. Where a municipality is defending against paying a debt on the ground of its want of power to borrow, a strict construction of powers in its favor will not be adopted. *Bank v. Chillicothe*, 7 O. (2nd pt.) 31.

(4) **Bonds in anticipation of assessment.**—Such bonds may be sold before the assessing ordinance

is passed. *Irwin v. Greenville*, 1 Dayton, 140.

As to injunction against payment of such bonds, because of irregularity in issuing, see *Ampt v. Cincinnati*, 3 N. P. 184.

*Validity of bonds.* Although the statute authorizing the assessment is invalid, and assessment cannot, therefore, be collected, the bonds authorized by same statute issued in anticipation of the assessment may be valid and enforceable. *Loeb v. Columbia Twp.*, 179 U. S. 472.

(5) **Form of bonds.**—It was held, under the former statutes that all bonds issued under the authority of Chap. 2, Div. 9, Title XII, R. S., must comply with § 2703 R. S., and express upon their face the purpose of issue and the ordinance under which issued. *Keehn v. Wooster*, 13 C. C. 270.

**Sec. 95a. [Municipalities authorized to issue notes in anticipation of collection of special assessments.]** Municipal corporations shall have power to borrow money and issue notes in anticipation of the collection of special assessments. Said notes shall be signed and sealed as municipal bonds are signed and sealed. They shall bear interest at a rate not exceeding six per cent. per annum and be due and payable not later than two years from the date of issue. Said notes shall not exceed in amount the estimated cost of the improvement, and shall recite upon their face the purpose for which they were issued. All assessments collected for the improvement, and all unexpended balances remaining in the fund after the cost and expenses of said improvement have been paid, shall be applied to [in] the payment of the notes and the interest thereon until

both are fully provided for. Council ordinances and proceedings relating to the issue of said bonds [notes] shall not require publication. [1904, April 27, 97 v. 520.]

**Sec. 96. [Power of municipalities to issue refunding bonds.]** Municipal corporations shall have power to issue bonds in the manner and for the purposes authorized by section 2701, Revised Statutes of Ohio, and the form and requisites of all bonds shall be such as are required by sections 2703, 2706, 2707 and 2708 of the Revised Statutes of Ohio.

**Sec. 2701 R. S. [Issue of bonds, etc., to extend time of payment.]** The trustees<sup>1</sup> or council of any municipal corporation, for the purpose of extending the time of the payment of any indebtedness, which from its limits of taxation such corporation is unable to pay at maturity, or when it appears to the said trustees or council for the best interest of the said municipal corporation, shall have power to issue bonds<sup>2</sup> of such corporation or borrow money so as to change but not to increase the indebtedness,<sup>3</sup> in such amounts and for such length of time and at such rate of interest as the council may deem proper, not to exceed the rate of six per centum per annum, payable annually or semi-annually; **provided, however, that** no indebtedness of any such municipal corporation shall be funded, refunded, or extended, unless such indebtedness shall first be determined to be an existing valid and binding obligation of any such municipal corporation<sup>4</sup> by a formal resolution of the trustees or council of such municipal corporation, which resolution shall also state the amount of the existing indebtedness to be funded, refunded or extended, the aggregate amount of bonds to be issued therefor, their number and denomination, the date of maturity, the rate of interest they shall bear, and the place of payment of principal and interest. [92 v. 368, 170; 89 v. 417; 70 v. 5, § 662.]

(1) **Trustees** referred to above apparently means trustees of hamlets and not Sinking Fund trustees, whose powers are defined in §§ 101-115 of the Code, inclusive. See note "Status of hamlets" under § 1 of the Code.

(2) **Purpose.**—This section does not give power to issue bonds of a municipality to meet deficiencies in the various departments. It is in-

tended to give the right to issue bonds where a funded indebtedness of the municipality exists. *Herrmann v. Cincinnati*, 9 C. C. 357, 359 (affirmed 52 O. S. 676).

Under this section council may, when there are outstanding bonds, and before the maturity of such bonds, issue refunding bonds to an amount equal to the original bond issue, at a lower rate of interest

and at longer time. But where the original bonds were sold at a premium, council cannot issue additional bonds in excess of original bond issue, to be used to pay holders of original bonds for premiums so paid. *Altaffer v. Nelson, Mayor*, 18 C. C. 145. As to refunding interest see *Cincinnati v. Guckenberger*, 60 O. S. 353.

The indebtedness for which the municipality may issue bonds under § 2701 R. S. must be such as the municipality has power to levy a tax to pay, or already evidenced by bonds, or such that bonds could have been issued at the time. The mere existence of claims for which in some manner the municipality is or may be made liable is not sufficient. *Newton v. Toledo*, 18 C. C. 756, 762 (affirmed 52 O. S. 649).

**Validity in general.**—Bonds made out in the name of the "town of Perrysburg" when the correct name was the "incorporated village of Perrysburg" were held valid. *Fosdick v. Perrysburg*, 14 O. S. 472.

Bonds to refund will not be valid if the original bond issue was unconstitutional. *Keehn v. Wooster*, 13 C. C. 270.

Bonds issued on faith of Supreme Court decision, will not be invalidated by a subsequent decision denying the right to issue such bonds. *Gelpke v. Dubuque*, 68 U. S. 175, followed, *State v. Gibson*, 8 N. P. 367.

Bonds issued under authority of the legislature to pay the moral obligation of a county though the claimants thereon had no cause of action cognizable in a court of law, will be upheld and their payment enforced against the county. *N. Y. Life Ins. Co. v. Cuyahoga Co.*, 106 Fed. 123.

Where a municipality has issued its bonds impressed with the seal of the city clerk, not having a seal of the corporation, but the bonds reciting that the seal attached is the

"corporate seal," the municipality is estopped to deny the validity of such seal. *Defiance v. Schmidt*, 14 O. F. D. 408.

Certain bonds of the city of Defiance recited on their face that they were "issued under and pursuant to the laws of the State of Ohio, and an act of the General Assembly passed Feb. 3, 1887, entitled, etc." Held that such bonds were valid, even though the particular act referred to was unconstitutional and furnished no authority for their issue, since authority was elsewhere to be found in the statutes. *Defiance v. Schmidt*, 14 O. F. D. 408.

**Purchase for value without notice.**—Where power is given to issue bonds on certain conditions, and the bonds purport to be issued under such law, they will be good in the hands of *bona fide* purchasers, notwithstanding irregularity in the acts of the authorities issuing them. *State ex rel. v. Board of Ed.*, 27 O. S. 96. See further *State v. Commissioners*, 37 O. S. 526.

Where a municipality has power, as under this section, to borrow for certain purposes, a *bona fide* lender will be protected, although the money was desired for an illegal purpose. *Ohio Farmers' Ins. Co. v. New Philadelphia*, 17 B. 250.

And the mere failure to comply with the statutory provisions relating to the issue of bonds will not relieve the municipality from the obligation to repay the money borrowed on the faith of such bonds. *Ampt v. Cincinnati*, 3 N. P. 184.

But bonds issued where no power to issue has been given by the legislature are invalid even in the hands of *bona fide* purchasers. *Ampt v. Cincinnati*, 3 N. P. 184, and cases cited.

Where an injunction was allowed restraining the issuing of certain municipal bonds, the decree being entered before the date of the bonds or the time when they purported to be signed and before the ordinance



authorizing them could go into operation under the statute, the fact that the bonds were in fact signed before the injunction was allowed, and sold will not protect the purchasers thereof as innocent purchasers for value. *Altaffer v. Nelson, Mayor*, 18 C. C. 145. But the rights of a *bona fide* holder are not affected by the fact that bonds bear a date prior to that of ordinance authorizing them. *Kent v. Dana*, 100 Fed. 56; 40 C. C. A. 281.

A bond under § 2701 R. S. must show on its face the purpose for which issued, and the ordinance or resolution authorizing it, in order that a purchaser may claim to be a purchaser for value without notice. *Keehn v. Wooster*, 13 C. C. 270.

Where the bond does not recite any ordinance or resolution authorizing its issue, it is not negotiable paper. *Sullivan v. Urbana*, 3 Dec. (Re.) 554. If such bond was in fact fraudulently issued, *bona fide* purchasers will not be protected. *Ib.*

The presumption is that the holder of bonds acquired them in good faith and for value. *Ampt v. Cincinnati*, 3 N. P. 184, and cases cited.

A purchaser cannot be charged with negligence in not anticipating that the law under which the bonds were issued would be held unconstitutional. *Life Ins. Co. v. Cuyahoga Co.*, 106 Fed. 123.

The *bona fide* purchaser of county bonds issued by officers having no authority to issue them was held not to be protected. In such case the bonds are void. *State v. Gibson*, 8 N. P. 367; *Hubbard v. Fitzsimmons*, 57 O. S. 436.

Limitations that purchaser is bound to take notice of. See *Miller v. Hixson*, 64 O. S. 39.

The recital in a bond that it is

issued in pursuance of an act of the legislature and ordinances of the city council passed in pursuance thereof, does not put a purchaser upon inquiry as to the terms of the ordinances under which the bonds were issued. *Evansville v. Dennett*, 161 U. S. 434; *Schmidt v. Defiance*, 13 O. F. D. 229.

**Estoppel by recitals.**—"It is now firmly established by decisions that if a municipality has power to and does issue bonds containing recitals of fact and such bonds come into the hands of innocent purchasers, such city is estopped from denying the truthfulness of such recitals." *Defiance v. Schmidt*, 14 O. F. D. 408; *Northern Bank v. Porter Township*, 5 O. F. D. 256.

**Where payable.**—Bonds can be made payable outside the state. *Meyer v. Muscatine*, 1 Wall. (U. S.) 384, 391; *Lynde v. Wennebago Co.*, 16 Wall. (U. S.) 6.

(3) **Not to increase indebtedness.**—Where a municipality is issuing bonds to refund its bonded indebtedness, it cannot, even by a separate resolution, issue additional bonds (besides those equal the amount of the original bonds) to pay compensation for premiums paid by holders of original bonds. *Altaffer v. Nelson, Mayor*, 18 C. C. 145. And see last sentence § 97 of the Code, *infra*. As to refunding interest, see *Cincinnati v. Guckenberg*, 60 O. S. 353.

(4) **Indebtedness first declared.**—In a petition in mandamus to compel the mayor to sign certain refunding bonds, the absence of averment that the council first declared the debt to be valid and described the bonds, will be fatal, on demurrer. *State v. Staley*, 18 C. C. 406 (affirmed 60 O. S. 632).

## FORM OF RESOLUTION TO ISSUE BONDS UNDER SEC. 2701 R. S.

### Resolution

To provide for the issue of bonds of the city [or village] of..... in the sum of \$....., for the purpose of extending the time of payment of certain indebtedness which from its limits of taxation the said city [or village] is unable to pay at maturity.

Be it resolved by the council of the city [or village] of....., State of Ohio:

Sec. 1. That certain indebtedness heretofore incurred by the city [or village] of....., to-wit, that incurred in (here state the manner in which the indebtedness was incurred) to the amount of \$..... is hereby determined and declared to be an existing, valid and binding obligation of said city [or village].

Sec. 2. To provide means to extend the time of payment of said indebtedness which from its limits of taxation the city [or village] or ..... is unable to pay at maturity there shall be issued the bonds of the city [or village] of..... to an aggregate amount of \$....., which said bonds shall be in the denomination of \$..... each, and numbered consecutively from one to....., all made payable at....., in the city [or village] of....., State of....., and all bearing interest at the rate of..... per cent. per annum, payable annually [or semi-annually] at the same place; and said bonds shall be dated and shall run for a period of..... years from their date.

Sec. 3. Said bonds shall express upon their face the purpose for which they were issued and that they were issued in pursuance of this resolution. They shall be prepared, issued and delivered under the direction of the finance committee of council (or other committee, if desired) and the city auditor [or village clerk] and shall be signed by the mayor of said city [or village] and by the city auditor [or village clerk] and sealed with the corporate seal of said city [or village]; and interest coupons attached to said bonds shall be executed by the city auditor [or village clerk] with his signature thereto, or he shall have his signature printed or lithographed thereon.

(If registered bonds are issued instead of coupon bonds, substitute the following for Sec. 3. "Sec. 3. Said bonds shall express upon their face the purpose for which they were issued and shall refer to this resolution. They shall be prepared, issued and delivered under the direction of the Finance Committee of council (or other committee, if desired) and the city auditor [or village clerk] and shall be signed by the mayor of said city [or village] and by the city auditor [or village clerk] and sealed with the corporate seal of said city [or village]. Said bonds shall be registered in the office of the Trustees of the sinking fund in the name of the purchaser and shall bear interest as aforesaid.")

Sec. 4. Said bonds shall be first offered at par and accrued interest to the trustees of the sinking fund in their official capacity and if the sinking fund trustees refuse to take any or all said bonds at par and interest, then said bonds not so taken shall be advertised for public sale and sold in the manner provided by law, but not for less than their par value and accrued interest. The proceeds from the sale of said bonds, except the premiums and accrued interest thereon, shall be used for the purpose of paying the indebtedness aforesaid and for no other purpose; and the premiums and accrued interest received from such sale shall be transferred to the trustees of the sinking fund to be applied by them in the manner provided by law.

Sec. 5. This resolution shall take effect and be in force from and after the earliest period allowed by law.

Passed..... 19....

President of Council.

Attest: ....., Clerk.

NOTE: In the form above given the action of council is called a "resolution," in accordance with the provisions of § 2701 R. S., § 2703 R. S., *infra*, requires that bonds shall express upon their face the "ordinance" under which they are issued. It would seem, however, that bonds issued under § 2701 need not be authorized by both a resolution and an ordinance, and that one would include the other. See note to § 2703 *infra*.

The form above given provides only for cases in which bonds are to be sold to take up and thus postpone the final extinguishment of, an existing indebtedness. This may readily be adapted to other circumstances contemplated in § 2701. If it is desired to exchange new bonds for old and reduce the rate of interest on obligations not matured, this may be done under § 97 of the Code, *infra*, and an adaptation of the above form may be used.

#### FORM OF MUNICIPAL BOND.

No.....

\$.....

UNITED STATES OF AMERICA.

STATE OF OHIO.

The city [or village]-of.....

#### BOND.

KNOW ALL MEN BY THESE PRESENTS: That the city [or village] of....., a municipal corporation under the laws of the State of Ohio, is indebted to the bearer hereof in the sum of \$..... which said city [or village] promises to pay on the..... day of....., in the year....., at....., in the city [or village] of....., State of....., with interest thereon at the rate of..... per cent. per annum, payable annually [or semi-annually] on the first day [or days] of....., [or and.....] in each year at....., in the city [or village] of..... State of....., upon the presentation and surrender of the interest coupons hereto attached as they severally become due.

This bond is issued for the purpose of (here state purpose) and under authority of the laws of Ohio and of § ..... of the Revised Statutes of Ohio [or of an act of the General Assembly of the State of Ohio passed on the.....day of....., ....., entitled an act, etc.] and under and in accordance with a certain resolution of the said city [or village] of....., entitled..... (here state title of resolution) passed on the.....day of....., 19....; and all proceedings relating to this bond have been in strict compliance with the said laws, statute and resolution aforesaid.

This bond is one of a series of bonds of like date and effect numbered consecutively from one to..... and amounting in the aggregate to \$....., said bonds being in the principal sum of \$..... each.

IN WITNESS WHEREOF, the said city [or village] of..... has caused its corporate name and seal to be hereunto affixed and the signatures of its mayor and auditor [or clerk] to be hereunto subscribed by said



officers, duly authorized in the premises, this.....day of....., 19.....

The city [or village] of.....

.....

Mayor.

Auditor [or clerk].

(Corporate Seal.)

#### COUPON.

On the.....day of..... the city [or village] of....., State of Ohio, promises to pay the bearer at.....in the city [or village] of.....State of....., \$....., being one year's [or six months'] interest due on that day on its Bond No.....

.....  
City Auditor [or village clerk].

**Sec. 2703 R. S. [Bonds to be explicit on their face.]** All bonds issued under authority of this chapter<sup>1</sup> shall express upon their face the purpose for which they were issued, and under what ordinance.<sup>2</sup> [66 v. 262, § 664.]

(1) See note (1) to § 95 of the Code.

(2) **When recital required.**—All municipal bonds issued under authority of former chapter beginning with § 2700 R. S., were held to be subject to requirement of § 2703 R. S. *Keehn v. Wooster*, 13 C. C. 270.

So, bonds to extend the time of payment of certain indebtedness, must comply with this section. *Ib.*

But notes given for a municipal loan need not express upon their face the purpose for which given. § 2703 applies only to bonds issued to be sold to the highest bidder. *Ohio Farmers' Ins. Co. v. New Philadelphia*, 17 B. 250.

**Sufficiency of recital.**—Bonds given to refund void bonds, reciting merely that they were given to take up other bonds, "as provided in an ordinance" of the municipality, are not valid, where there was no ordinance for their issue. *U. S. Trust Co. v. Mineral Ridge*, 104 Fed. 851.

See also, as to sufficiency of statement of purpose, *Hensly v. Hamilton*, 3 C. C. 201; *Keehn v. Wooster*, 13 C. C. 270; *Kent v. Dana*, 100 Fed. 56, 40 C. C. A. 281; *Clapp v. Marice City*, 111 Fed. 103.

**Effect of non recital.**—A bond not containing a reference to the ordinance or resolution authorizing it was held not to be negotiable paper. *Sullivan v. Urbana*, 3 Dec. (Re.) 554 (*Ohio Law Journal*).

Municipality will not be estopped to deny legality. *Keehn v. Wooster*, 13 C. C. 270; and no one can claim to be innocent purchaser of such bond. *Ib.*

**Estoppel by recitals.**—See notes to § 2701 R. S., *supra*, p. 278.

**Ordinance** referred to in § 2703 R. S. above, doubtless covers the "formal resolution" required in § 2701 R. S. *supra*. "Ordinance" and "resolution" mean the same thing when the procedure respectively required is complied with. *Kerlin Bros. v. Toledo*, 20 C. C. 603.

**Sec. 2706 R. S. [Form and requisites of municipal bonds, etc.]** All bonds, notes or certificates of indebtedness issued by municipal corporations shall be signed by the mayor and by the auditor, comptroller or the clerk thereof, and be sealed with the seal of the corporation,<sup>1</sup> and when issued for street improvements shall have the name of the street or portion thereof so improved, and for which the same were issued, legibly written or printed upon them. [1883, March 21: 80 v. 66; Rev. Stat. 1880; 66 v. 86, § 666.]

(1) **Duty of officers.**—It would be a breach of duty for the mayor to sign bonds containing false recitals as to matters and things required to be done to make the bonds valid. *Defiance v. Schmidt*, 14 O. 1. D. 408.

**Seal.**—Where bonds are sealed with the seal of the city clerk, but contain a recital that the seal is the corporate seal, the city will be estopped to deny validity of seal. *Ib.*

**Sec. 2707 R. S. [Bonds may have coupons attached.]** Bonds issued as provided in this chapter<sup>1</sup> may, in the discretion of the council, have interest coupons attached.<sup>2</sup> [66 v. 262, § 667.]

(1) See note (1) under § 95 of the Code, *supra*, p. 274.

(2) **Interest coupons.** — The power to issue interest bearing bonds was held to include, of itself, the authority to attach interest cou-

pons. *State ex rel. v. Comm'rs*, 6 O. S. 280, 286.

Possession of interest warrants is *prima facie* evidence of ownership of bonds and their non-payment. *Ib.*

**Sec. 2708 R. S. [Character of bonds in certain cases.]** Where the corporation is divided into districts for sewerage purposes, bonds issued for money borrowed to pay the expense of constructing or repairing sewers in any such district, shall have the name and number of the district for which they are issued legibly written or printed upon them. [66 v. 262, § 668.]

**Sec. 97. [Municipal bonds first offered to trustees of sinking fund.]**<sup>1</sup> Municipal bonds shall be sold in the manner herein provided. Whenever any municipal corporation issues its bonds, it shall first offer them at par and accrued interest to the trustees or commissioners, in their official capacity, of the sinking fund, or, in case there are no such trustees or commissioners, to the officer or officers of such corporation having

charge of its debts, in their official capacity, and only after their refusal to take all or any of such bonds at par and interest, *bona fide* for and to be held for the benefit of such corporation, sinking fund or debt, shall such bonds, or as many of them as remain, be advertised for public sale.

[**Not to be sold for less than par value.**] In no case shall the bonds of the corporation be sold for less than their par value; <sup>2</sup> nor shall such bonds when so held for the benefit of such sinking fund or debt, be sold, except when necessary to meet the requirements of such fund or debt.

[**Sold to highest bidder after notice by publication.**] All sales of bonds, other than to the sinking fund, by any municipal corporation, shall be to the highest and best bidder,<sup>3</sup> after thirty days' notice in at least two newspapers of general circulation in the county where such municipal corporation is situated, setting forth the nature, amount, rate of interest and length of time the bonds have to run, with time and place of sale.<sup>4</sup> Additional notice may be published outside of such county by order of the council,

[**When may be sold at private sale.**] provided, however, when any such bonds have been once so advertised and offered for public sale, and the same or any part thereof, remain unsold, then said bonds, or as many as remain unsold, may be sold at private sale at not less than their par value, under the direction of the mayor and the officers and agents of the corporation by whom said bonds have been, or shall be, prepared, advertised and offered at public sale;<sup>5</sup>

[**Refunding of corporate indebtedness.**] provided, further, that when it shall appear to the trustees or council of any municipal corporation, to be for the best interests of such corporation to renew or refund any bonded indebtedness of such corporation which shall not have matured, and thereby reduce the rate of interest thereon, such trustees or council shall have



authority to issue for that purpose new bonds, with semi-annual interest coupons attached, and to exchange the same with the holder or holders of such outstanding bonds, if such holder or holders shall consent to make such exchange and to such reduction of interest."

When new bonds are issued the same shall not in any case exceed in amount the outstanding bonded indebtedness to be renewed or refunded.

(1) **Old section.**—§ 2709 R. S. as amended in 95 O. L. 507, is substantially re-written as § 97 above, though the old statute is not expressly repealed by the Code. It is, however, clearly superseded.

(2) **Sale for less than par.**—Bonds sold for less than par, though void in the hands of one who illegally bought them are not void as against an innocent purchaser into whose hands they subsequently came. *State ex rel. v. Board of Education*, 27 O. S. 96.

(3) **Highest bidder.**—City council's discretion in determining which is the highest and best bid if bids were uncertain, will not be interfered with. *Irwin v. Greenville*, 1 Dayton, 140.

See further as to discretion, *Guckenberger v. Dexter*, 5 N. P. 429; 60 O. S. 353.

Where the terms of the highest bid are clearly understood by buyer and seller and the bid is accepted there can be complaint, as to ambiguity in the terms, by other bidders. *Atlas Bank v. Cincinnati*, 11 Dec. 436.

**Compliance with advertisement.**—A bid of 103 5-10 with interest is not ambiguous and sufficiently complies with an advertisement requiring the gross amount of the bid to be stated. *Atlas Bank v. Cincinnati*, 11 Dec. 436.

A bid offering par and accrued interest to date complies with advertisement stating that no bid will

be received for less than par and accrued interest "to date of delivery" for the bid will be construed as meaning payment of interest from date of issue to date of delivery. *Hayes v. Board of Education*, 22 C. C. 32 (aff'd, 68 O. S. 685).

**Right to reject all bids.**—See upon general subject of right to reject all bids whether or not expressly conferred by statute, *State ex rel. v. Cincinnati*, 3 C. C. 542; *State ex rel. v. Comm'rs*, 36 O. S. 326; *State v. Comm'rs*, 39 O. S. 188; *State ex rel. v. Comm'rs*, 1 C. C. 194; *State ex rel. v. Directors*, 5 O. S. 234.

(4) **Sufficiency of advertisement.**—An advertisement stating that the bonds are to be delivered on a certain day is sufficient and the sale is valid, although on the day set for delivery, but before the bidding, it is announced that the bonds will be delivered in installments covering a period of four months, giving the purchaser the benefit of the interest accruing upon the later installments. *Franklin v. Baird*, 7 N. P. 571.

A bidder cannot complain of a variance, as to the time of redemption, between the advertisement and the resolution authorizing the bonds, where the bonds were made payable according to the advertisement. *State ex rel. v. Allison*, 8 N. P. 170.

Whether objection can be raised as to sufficiency of advertisement after

bonds have been issued and the money is in the treasury, see *State ex rel. v. Amlin*, 13 Dec. 334.

**When sold.**—Bonds for improvement may be sold before the assessing ordinance has been passed. *Irwin v. Greenville*, 1 Dayton, 140. Bonds sold before date will not be good in the hands of a *bona fide* purchaser when injunction against their issue was allowed before the date of the bonds. *Altaffer v. Nelson*, mayor, 18 C. C. 145.

**Sinking fund bonds**, issued to refund or extend existing obligations, as authorized by § 113 of the Code, are subject to the provisions of § 97 above (old § 2709 R. S.) and can be sold only to the highest

and best bidder after advertisement *Cincinnati v. Guckenberger*, 60 O. S. 353; *Roberts & Co. v. Taft*, 109 Fed. 825; 48 C. C. A. 681. See also § 115 of the Code.

(5) **Private sale.**—When bonds were duly offered and bids received by proper municipal officers, but before time for awarding, municipality was enjoined from awarding the bonds and thereupon all bids were withdrawn (as they could be, any time before acceptance), the officers might lawfully sell such bonds at private sale. *Vadakin v. Crilly*, 7 C. C. (N. S.) 341 (aff'd, 73 O. S. 380).

(6) **Forms** of ordinance or resolution effecting such exchange and of the new bonds to be exchanged for the old may be adapted from forms given under § 2701 R. S. *supra*, p. 278.

## FORM OF NOTICE OF SALE OF BONDS.

### Legal Notice.

Sealed proposals will be received at the office of the auditor [or clerk] of the city [or village] of....., State of Ohio, until 12 o'clock noon of....., 19...., for the purchase of bonds of the said city [or village], in the aggregate sum of \$..... dated the .....day of....., 19...., payable in..... years from date, each being in the sum of \$....., and bearing interest at the rate of.....per cent. per annum, payable annually [or semi-annually], issued for the purpose of (here state purpose of issue) and under authority of the laws of Ohio and of § ..... of the Revised Statutes of Ohio [or of an act of the General Assembly of the State of Ohio passed on the.....day of....., ....., entitled an act etc.], and under and in accordance with a certain ordinance [or resolution] of the said city [or village] entitled (here state title) passed on the..... day of....., 19....

Said bonds will be sold to the highest and best bidder for not less than par and accrued interest.

All bids must state the number of bonds bid for and the gross amount of bid and accrued interest to date of delivery (and if desired, add, "All bids to be accompanied with a certified check, payable to the treasurer of the city [or village] for..... per centum of the amount of bonds bid for, upon condition that if the bid is accepted the bidder will receive and pay for such bonds as may be issued as above set forth, within ten days from the time of award, said check to be retained by the city [or village] if said condition is not fulfilled.")

The city [or village] of..... reserves the right to reject any and all bids.

Bids should be sealed and endorsed "bids for.....bonds."

....., 19.....

Auditor [or clerk].

**Sec. 98. [Registration of bonds.]**<sup>1</sup> Municipal corporations may, on demand of the owner or holder of any of its coupon bonds heretofore or hereafter issued, issue in lieu thereof a registered bond, or bonds, of the corporations not exceeding in amount the coupon bonds offered in exchange. The registered bond or bonds shall be signed and sealed as other municipal bonds are signed and sealed, and bear the same rate of interest, be payable both principal and interest at the same time and place, as the coupon bonds for which the exchange is made. They shall be of such denomination as the holder of the coupon bonds may elect. The interest and principal of such registered bonds shall when due be paid only to the person, corporation or firm, appearing by the records of the municipal corporation to be the owner thereof, or order; and such registered bonds may be transferred on said record by the owner in person or by a person authorized so to do by power of attorney duly executed. The exchange and registration here required shall be transacted by the trustees of the sinking fund at their business office where a registry shall be kept for that purpose which shall show the date, series, denomination and owner of such registered bonds, and the number and series of the coupon bonds for which they were exchanged. No registered bonds shall be issued by a municipal corporation until the bonds and coupons offered in exchange shall have been cancelled or destroyed. The trustees of the sinking fund may demand of the holder of the coupon bonds a reasonable fee as compensation for the expense of making such exchange. [1904, April 27, 97 v. 516.]

(1) **Old section 2711 R. S., repealed.**

**[Sec. 99. [Deficiency bonds; limitation; submission of question to vote.]** Council shall have power to issue deficiency bonds in such amount and denominations and for such periods of time, not exceeding fifty years and at such rate of interest not ex-



ceeding six per cent. as it shall deem best whenever, in the opinion of council, it is necessary to supply a deficiency in the revenues of the corporation; provided, that the total amount of such deficiency bonds issued by any corporation, outstanding at any time, shall not exceed one per cent. of the total value of all property in such corporation as listed and assessed for taxation; and provided further, that the issuance of such bonds shall be approved by the votes of two-thirds of all the members elected to council, and approved by the votes of two-thirds of all the electors of the corporation voting upon such question at a regular or special election to be provided for by council.

**Forms** for the above may be 2837 R. S., re-enacted in § 100 of adapted from those given under § the Code, *infra*, p. 294.

**Sec. 100. [General provisions relative to bonds.]** All municipal corporations shall have power to issue bonds for the various purposes, to the amounts and with the limitations provided in the act passed April 29, 1902, entitled "An act to amend sections 2835, 2836 and 2837 and to repeal section 2837a of the Revised Statutes of Ohio, authorizing the issue of bonds by cities, villages, hamlets and townships," and such act shall be and remain in full force and effect; all premiums and accrued interest received by the corporation from a sale of its bonds shall be transferred to the trustees of the sinking fund to be by them applied on the bonded debt and interest account of the corporation; provided, that the premiums and accrued interest upon bonds issued for special assessments shall be applied by the trustees of the sinking fund to the payment of the principal and interest of those bonds and no others.

(b) *Longworth Bond Act.*<sup>1</sup>

**Sec. 2835 R. S. [Townships and municipalities may issue and sell bonds for purposes specified in this act.]**<sup>2</sup> The trustees of any township, or the council of any municipal corporation of the state of Ohio, shall have the power to issue and sell bonds in such amounts and denominations, for such period of time and at such rate of interest, not exceeding six per cent., and in such manner as is provided by law for the sale of

bonds by such township or municipal corporations, for any of the purposes provided for in this act, whenever such trustees or council by an affirmative vote of not less than two-thirds of the members elected or appointed thereto shall by resolution or ordinance deem the same necessary.

1. For procuring the real estate and right of way for any improvement authorized by this section, or for purchasing real estate with a building or buildings thereon, to be used for public purposes.

2. For extending, enlarging, improving, repairing or securing a more complete enjoyment of any building or improvement authorized by this section, and for equipping and furnishing the same.

3. For sanitary purposes and for erecting a crematory or providing other means for disposing of garbage and refuse matters.

4. For improving highways leading into the township or corporation, or for building or improving a turnpike, or for purchasing one or more turnpike roads and making the same free.

5. For constructing wharves and landings on navigable waters.

6. For erecting infirmaries.

7. For erecting workhouses, prisons and police stations.

8. For erecting houses of refuge and corrections.

9. For erecting market houses and providing market places.

10. For erecting public halls and public offices.

11. For erecting or purchasing waterworks and supplying water to the township or corporation and the inhabitants thereof.

12. For erecting or purchasing gas works or electric light works, and for supplying light to the township or corporation and the inhabitants thereof.

13. For providing grounds for cemeteries or crematories, for enclosing and embellishing the same, and for erecting vaults.

14. For constructing sewers, sewage disposal works, flushing tunnels, drains and ditches.

15. For establishing free public libraries and reading rooms.

16. For the establishment of free public baths.

17. For erecting monuments to commemorate the services of soldiers, sailors and marines of the state and nation.

18. For improving any water course or water front.

19. For the payment of obligations arising from emergencies resulting from epidemics, or floods, or other forces of nature.

20. For purchasing and condemning the necessary land for park and boulevard purposes and for improving the same as well as for improving or completing the improvement of any existing boulevard, park, or parks.

21. For erecting hospitals and pest houses and for rebuilding, or improving existing hospitals and pest houses.

22. For resurfacing, repairing, or improving any existing street or streets as well as other public highways.

23. For opening, widening and extending any street or public highway.

24. For purchasing or condemning any land necessary for street or highway purposes, and for improving the same or paying any portion of the cost of such improvement.

25. For constructing levees and embankments or paving or improving the same, and for improving any water course passing through said township or municipal corporation.

26. For constructing or repairing viaducts, bridges and culverts, and for purchasing or condemning the necessary land therefor.

27. For erecting any building necessary for a fire department, purchasing fire engines, fire boats, constructing water towers, and fire cisterns, and paying the cost of placing underground the wires or other signal apparatus of any fire department.

**[Total bonded indebtedness permitted to be created by township or municipality in any one year.]** The bonds herein authorized may be issued for any or all purposes enumerated herein, but the total bonded indebtedness hereafter created in any one fiscal year under the authority of this act by any township or municipal corporation shall not exceed one (1) per cent. of the total value of all property in such township or municipal corporation, as listed and assessed for taxation, except as otherwise provided in this act.<sup>3</sup>

**[Exception; may exceed said amount after submission of question to vote.]** Whenever the trustees of any township or the council of any municipal corporation, shall by resolution or ordinance<sup>4</sup> passed by an affirmative vote of not less than two-thirds of all the members elected or appointed thereto, deem it necessary in any one fiscal year to issue bonds for all or any of the purposes<sup>5</sup> authorized in this act in any amount greater than one per cent. of the total value of all property in such township or municipal corporation as listed and assessed for taxation, then and in that event they shall submit the question of issuing any bonds in excess of said one per cent. to a vote of the qualified electors of such township or municipal corporation at a general or special election in the manner hereafter provided in section 2837, Revised Statutes.

**[Amount of net indebtedness permitted to be incurred by township or municipality at any time; exception.]** Provided, however, that the net indebtedness incurred by any township or municipal corporation, after the passage of section 2835, Revised Statutes, as amended April 29, 1902, for the purpose herein enumerated, shall never exceed four (4) per cent. of the total value of all property in such township or municipal corporation, as listed and assessed for taxation, unless an ex-



cess of such amount is authorized by vote of the qualified electors of such township or municipal corporation in the manner hereafter provided in section 2837, Revised Statutes.

["**Net indebtedness**" defined.] In arriving at the net indebtedness incurred, allowance shall be made only for the amount held in the sinking fund for the redemption of bonds theretofore issued under the provisions of section 2835 as amended April 29, 1902, and subsequently, and the net indebtedness shall be held to be the difference between the par value of all such outstanding and unpaid bonds and the amount held in the sinking fund for their redemption.

[**Fiscal year for purposes of this act.**] For the purposes of this act the fiscal year shall hereafter be the calendar year, from January 1 to December 31 inclusive, and an indebtedness shall not be deemed to have been created or incurred, where the work is to be done by or through the officers of the township or municipal corporation, until the bonds therefor have been issued and sold. [1906, April 4, 98 v. 63; 97 v. 291; 95 v. 318.]

(1) **Held constitutional.**—This act, amending old §§ 2835, 2836 and 2837 R. S., and known as the "Longworth Bond Act," was held constitutional in *Guckenberger v. Henderson*, 66 O. S. 692.

**Construction of old sections,** before amendment, see *Dunham v. Opes*, 3 C. C. 274 (holding that the former sections outlined the exclusive method by which bonds could be issued, where the power was not given to council to act of its own motion, unless § 2687 R. S. conferred the power, which was not decided). *Hensly v. Hamilton*, 3 C. C. 201 (holding gas works to be a local improvement within the meaning of former sections).

(2) **Hamlets.**—See note "Status of hamlets" under § 1 of the Code.

(3) **Dividing cost of improvement.**—Whether a municipality may make a partial appropriation of property for a waterworks system, which will not involve the issuance of bonds in a sum greater than one per cent. of the tax duplicate and thus evade the submission of the question to popular vote, *quere*. *Knauss v. Columbus*, 13 Dec. 200.

(4) **Resolution or ordinance declaring necessity.**—*Condition precedent.*—The proper adoption of the resolution or ordinance declaring it necessary to issue and sell the bonds of the corporation for a

specified purpose as authorized by the above section, and providing therein for submission of the question to popular vote, is essential to the validity of all subsequent proceedings and to the bond issue. *Gas and Water Co. v. Elyria*, 57 O. S. 374.

**Character of resolution or ordinance.**—Such resolution or ordinance is of a general and permanent nature and must be read on three different days, unless the rule is duly dispensed with. *Gas and Water Co. v. Elyria*, 57 O. S. 374.

Such resolution or ordinance must provide for but one improvement and cannot combine two distinct measures and if it does so, it will not be effectual for either purpose. *Ib.*

**Manner of bond issue,** it was held under former section, must be determined by council and this power could not be delegated to mayor. *Gas and Water Co. v. Elyria*, 57 O. S. 374.

(5) **Several improvements under one submission.**—The question of increasing size of waterworks system and erecting electric plant in connection therewith, could be submitted as one question, if both were substantially one improvement. *Ryan v. Orbison*, 7 C. C. 30.

But the purchase of waterworks and the erection of new ones, are distinct measures and require different proceedings. *Gas and Water Co. v. Elyria*, 57 O. S. 374.

FORM OF ORDINANCE TO ISSUE BONDS WITHOUT SUBMISSION  
TO POPULAR VOTE.

Ordinance No.....

To issue bonds for the purpose of.....

Be it ordained by the council of the city [or village] of.....,  
State of Ohio, two-thirds of the members elected thereto concurring:

Sec. 1. That it is deemed necessary by the council of the city [or  
village] of....., to issue and sell the bonds of said city  
[or village] in the sum of.....dollars, for the purpose of  
..... (here state purpose of bond issue).

Sec. 2. That the bonds of said city [or village] be issued in the sum of  
\$..... for the aforesaid purpose; each of said bonds to be in the  
denomination of \$....., and numbered consecutively from one to  
....., and all made payable on the.....day of....., .....,  
and bearing interest at the rate of..... per cent. per annum, payable  
annually [or semi-annually] [if coupon bonds, evidenced by coupons at-  
tached thereto]; said bonds shall be dated..... and shall run  
for a period of.....years from said date; and said bonds  
shall be payable at.....in the city [or village] of  
....., State of.....

Sec. 3. Said bonds shall express upon their face the purpose for which  
they are issued and that they are issued in pursuance of this ordinance.  
They shall be prepared, issued and delivered under the direction of the  
finance committee of council (or other committee if desired) and the city  
auditor [ or village clerk] and shall be signed by the mayor of said city [or  
village] and by the city auditor, [or village clerk] and sealed with the  
corporate seal of said city [or village]; and the interest coupons attached  
to said bonds shall be executed by the city auditor [or village clerk] with  
his signature thereto, or he shall have his signature printed or lithographed  
thereon;

(If registered bonds are issued instead of coupon bonds substitute the  
following for Sec. 3. "Sec. 3. Said bonds shall express upon their face  
the purpose for which they are issued and that they are issued in pursuance  
of this ordinance. They shall be prepared, issued and delivered under the  
direction of the finance committee of the council (or other committee, if  
desired) and the city auditor [or village clerk] and shall be signed by  
the mayor of said city [or village] and by the city auditor [or village clerk]  
and sealed with the corporate seal of said city [or village]. Said bonds  
shall be registered in the office of the trustees of the sinking fund in the  
name of the purchaser and shall bear interest as aforesaid.")

Sec. 4. Said bonds shall be first offered at par and accrued interest to  
the trustees of the sinking fund in their official capacity, and if the sinking  
fund trustees refuse to take any or all said bonds at par and interest, then  
said bonds not so taken shall be advertised for public sale and sold in the  
manner provided by law, but not for less than their par value and accrued  
interest.

Sec. 5. The proceeds from the sale of said bonds, except the premiums  
and accrued interest thereon, shall be placed in the city [or village] treas-  
ury to the credit of the.....fund and shall be disbursed upon proper  
vouchers for the purpose of (here state purpose of the bond issue) and for  
no other purpose; and the premiums and accrued interest received from

such sale shall be transferred to the trustees of the sinking fund to be applied by them in the manner provided by law.

Sec. 6. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed....., 19.....

.....  
President of Council.

Attest:

.....  
Clerk.

NOTE: Form of bond may be adapted from that given under § 2701 R. S., re-enacted in § 96 of the Code, p. 280; and form of notice of sale of bonds from that given under § 97 of the Code, p. 285.

**Sec. 2835b R. S.** [When limitation above prescribed not applicable.] Provided further that the limitations of one per cent. and four per cent. prescribed in section 2835, Revised Statutes, shall not be construed as affecting bonds issued under authority of said section 2835 upon the approval of the electors of the corporation, nor shall bonds which are to be paid for by assessments specially levied upon abutting property, nor bonds issued for the purpose of constructing, improving and extending waterworks when the income from such waterworks is sufficient to cover the cost of all operating expenses, interest charges and to pass a sufficient amount to a sinking fund to retire such bonds when they become due, nor any bonds issued prior to the passage of section 2835, Revised Statutes, as amended April 20, 1902, be deemed as subject to the provisions and limitations of said section, or be considered in arriving at the limitations therein provided. [1906, April 4, 98 v. 66; 97 v. 520.]

**Sec. 2836 R. S.** [Tax shall be levied to pay bonds and interest; exception.] For the payment of bonds issued under the authority of section 2835 of the Revised Statutes or issued after submission of the question to the people under the provisions of section 2837 of the Revised Statutes, the trustees of any township or the council of any municipal corporation shall, unless the interest on and redemption of such bonds is otherwise provided for, levy a tax in addition to all levies now authorized by law, every year during the period said bonds have to run sufficient to pay the interest on said bonds and to provide a sinking fund for their final redemption at maturity. [1906, April 4, 98 v. 66; 95 v. 321; 93 v. 360; 76 v. 158.]

**Sec. 2837 R. S.** [Procedure when question of bond issue must be submitted to vote.] Before any bonds in excess of the



said one per cent. in any one year or in excess of the said four per cent. in the aggregate are issued or tax levied, as provided in sections 2835 and 2836, Revised Statutes, the question of issuing the same shall be submitted to the voters of the township or municipal corporation at a general or special election. And whenever the trustees of any township or the council of any municipal corporation shall by resolution or ordinance passed by an affirmative vote of not less than two-thirds of all the members elected or appointed thereto, declare it necessary to issue and sell the bonds of such township or municipal corporation as the case may be, for any or either of the purposes mentioned in section 2835 of the Revised Statutes in excess of the amounts therein authorized, and shall by such resolution or ordinance fix a date upon which the question of issuing and selling such bonds shall be submitted to the electors of such township, or municipal corporation, and shall cause a copy of such resolution or ordinance to be certified to the deputy state supervisors of the county in which such township or municipal corporation is situated, and such deputy state supervisors shall thereupon proceed to prepare the ballots and make all other necessary arrangements for the submission of such question to the electors of any such township or municipal corporation at the time fixed in said resolution. Such election shall be held at the regular place or places of voting in such township or municipality, and shall be conducted, canvassed and certified in the same manner, except as otherwise provided by law, as November elections in such township or municipal corporation for the election of officers thereof. Thirty days' notice of the submission shall be given in one or more papers printed therein once a week for four consecutive weeks, stating the amount of bonds to be issued, the purpose for which they are to be issued, and the time and place of holding the election; and if no newspaper is printed therein the notice shall be posted in a conspicuous place and published once a week for four consecutive weeks in some newspaper of general circulation in the township or municipal corporation;

[**Number of votes necessary to authorize issue.**] and if two-thirds of the voters voting at such election upon the question of issuing the bonds vote in favor thereof, then and not otherwise the bonds for such excess shall be issued and tax levied. Those who vote in favor of the proposition shall have written or printed on their ballots in quotation, "For the issue of bonds;" and those who vote against the same shall have written or printed on their ballots the words, "Against the issue of bonds."

[**Total net indebtedness permitted.**] Provided, however, that no township or municipal corporation shall hereafter create or incur a net indebtedness under the authority of this act in excess of eight per cent. of the total value of all property in such township or municipal corporation as listed and assessed for taxation. All bonds heretofore issued in good faith under the authority of section 2835, Revised Statutes, as amended April 29, 1902, and April 23, 1904, which at the time of issue, were within the limitations herein provided, shall be valid obligations of the township, city, village, or other municipal corporation which issued them and in arriving at the limitations of 8 per cent. herein provided, and of 4 per cent. in section 2835, Revised Statutes; provided, all such bonds, except those excluded by the provisions of section 2835b, Revised Statutes, shall be considered.<sup>1</sup> [1906, April 4, 98 v. 66; 97 v. 190; 95 v. 321; 95 v. 111; 91 v. 106; 91 v. 98; 90 v. 226; 76 v. 158.]

(1) The limitation of eight per cent. as it read even before amendment of 1906, was held to have only a prospective operation, and indebtedness created or assumed prior to

the passage of the act was not to be considered in ascertaining whether the prescribed limit of indebtedness had been reached. *Tiffin v. Griffith*, 74 O. S. — (51 B. 183).

#### FORM OF RESOLUTION DECLARING NECESSITY OF BOND ISSUE.

##### Resolution.

Declaring it necessary to issue bonds for the purpose of.....

Be it resolved by the council of the city [or village] of....., State of Ohio, two-thirds of all the members elected thereto concurring, that it is necessary to issue and sell bonds in the fiscal year beginning January first, 19....., for the purpose of..... (here state purpose of bond issue) in an amount greater than one per cent. of the total value of all property in said city [or village] as listed and assessed for taxation, to wit: in the sum of \$....., and that the question of issuing and selling the bonds of said city [or village] in excess of said one per cent., that is, in the sum aforesaid, be submitted to a vote of the qualified electors of said city [or village] at the general election to be held in said city [or village] on the.....day of November, 19....., at the regular place or places of voting in said city [or village] and said election shall be conducted, canvassed and certified in the same manner as other general municipal elections.

(If the question is to be submitted at a special election the form should read: at a special election to be held in said city for that purpose on the.....day of....., 19.....)

That the mayor be and he is hereby directed to give public notice of the time and place of holding said election in the manner provided by law.

That the clerk be and he is hereby directed to certify a copy of this resolution to the deputy state supervisors of.....County, Ohio.

Passed....., 19.....

Attest.....,  
Clerk.

.....  
President of Council.

### FORM OF NOTICE OF ELECTION.

#### Legal Notice.

Notice is hereby given that in pursuance of a resolution of the council of the city [or village] of....., passed on the.....day of....., 19....., there will be submitted to the qualified electors of said city [or village] at the general election in the city [or village] of....., on the.....day of November, 19.., [or at a special election to be held in the city [or village] or..... on the.....day of....., etc.] the question of issuing bonds of said city [or village] in an amount in excess of one per cent. of the total value of all the property in such city [or village] as listed and assessed for taxation, that is to say, in the sum of \$.....for the purpose of.....(here state purpose of bond issue). (If the question is to be submitted at a special election the notice must further, where applicable, contain a designation of the voting place in each ward as fixed by the deputy state supervisors of election.

Those who vote in favor of the proposition of issuing the bonds as aforesaid shall have written or printed on their ballots the words "For the issue of bonds" and those who vote against the same shall have written or printed on their ballots the words "Against the issue of bonds."

....., 19.....

.....,  
Mayor.

### FORM OF ORDINANCE TO ISSUE BONDS AFTER AFFIRMATIVE POPULAR VOTE.

#### Ordinance No.....

To issue bonds for the purpose of.....

Whereas, at a general election held in the city [or village] of....., on the.....day of November, 19....., [or at a special election held for that purpose on the.....day of....., 19...], the question of issuing the bonds of said city [or village] in an amount in excess of one per cent. of the total value of all property in such city [or village] as listed or assessed for taxation, that is, in the sum of \$..... for the purpose of.....(here state purpose of bond issue) was submitted to a vote of the qualified electors of said city [or village] and,

Whereas, two-thirds of the voters voting at such election upon the question of issuing said bonds voted in favor thereof, now therefore,

Be it ordained by the council of the city [or village] of....., State of Ohio.

Sec. 1. That the bonds of the said city [or village] be issued in the sum of \$.....for the purpose of (here state purpose of bond issue); each of said bonds to be in the denomination of \$..... numbered consecutively from one to....., all made payable on the.....day of.....and bearing interest at the rate of.....per cent. per annum, payable annually [or semi-annually] [if



*coupon bonds*, evidenced by coupons attached thereto] said bonds shall be dated.....and shall run for a period of.....years; and said bonds shall be payable at.....in the city [or village] of ..... State of .....

Sec. 2. Said bonds shall express upon their face the purpose for which they are issued and that they are issued in pursuance of this ordinance. They shall be prepared, issued and delivered under the direction of the Finance Committee of council (or other committee, if desired) and the city auditor [or village clerk] and shall be signed by the mayor of said city [or village] and by the city auditor [or village clerk] and sealed with the corporate seal of said city [or village] and the interest coupons attached to said bonds shall be executed by the city auditor [or village clerk] with his signature thereto, or he shall have his signature printed or lithographed thereon;

(If registered bonds are issued instead of coupon bonds, substitute the following for Sec. 2. "Sec. 2. Said bonds shall express upon their face the purpose for which they are issued and that they are issued in pursuance of this ordinance. They shall be prepared, issued and delivered under the direction of the Finance Committee of council (or other committee if desired) and the city auditor [or village clerk] and shall be signed by the mayor of said city [or village] and by the city auditor [or village clerk] and sealed with the corporate seal of said city [or village]. Said bonds shall be registered in the office of the trustees of the sinking fund in the name of the purchaser and shall bear interest as aforesaid.")

Sec. 3. Said bonds shall be first offered at par and accrued interest to the trustees of the sinking fund in their official capacity, and if the sinking fund trustees refuse to take any or all of said bonds at par and interest then said bonds not so taken shall be advertised for public sale and sold in the manner provided by law, but not for less than their par value and accrued interest.

Sec. 4. The proceeds from the sale of said bonds, except the premiums and accrued interest thereon, shall be placed in the city [or village] treasury to the credit of the.....fund and shall be used for the purpose of (here state purpose of the bond issue) and for no other purpose; and the premiums and accrued interest received from such sale shall be transferred to the trustees of the sinking fund, to be applied by them in the manner provided by law.

Sec. 5. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed....., 19....

.....,  
President of Council.

Attest, .....  
Clerk.

NOTE: Form of bond may be adapted from that given under § 2701 R. S., reenacted in § 96 of the Code, p. 280; and form of notice of sale of bonds from that given under § 97 of the Code, p. 285.

SEVENTH. SINKING FUND.<sup>1</sup>

**Sec. 101.** [Tax for creating a sinking fund.]<sup>2</sup> All municipal corporations having outstanding bonds or funded debts shall, through their councils, and in addition to all other taxes authorized by law, levy and collect annually a tax upon all the real and personal property in the corporation sufficient to pay the interest and provide a sinking fund for the extinguishment of all bonds and funded debts and for the payment of all judgments final, except in condemnation of property cases, and the taxes so raised shall be used for no other purpose whatever.

(1) **Chapter of Revised Statutes** relating to the sinking fund was formerly Chap. 3, Div. 9, Title XII, §§ 2712 to (2729-11) R. S., inclusive, and 95 O. L. 5, all repealed.

(2) **Old section** 2712 R. S. repealed.

**Sec. 102.** [Trustees of the sinking fund.]<sup>1</sup> In all municipal corporations the sinking fund shall be managed and controlled by a board designated as the trustees of the sinking fund, which in cities shall be composed of four citizens thereof, which shall also be the tax commission as provided herein,<sup>2</sup> not more than two of whom shall belong to the same political party, and who shall be appointed by the mayor. In villages the trustees of the sinking fund shall be the mayor, clerk and chairman of the finance committee of council.

(1) **Old section.**—Compare old §§ 2715 R. S., repealed.

(2) **Tax commission.** See § 46 of the Code, *supra*.

**Sec. 103.** [Compensation and bond.]<sup>1</sup> The trustees of the sinking fund shall serve without compensation and shall give such bond as council may require; provided, that any surety company authorized to sign such bonds shall be sufficient security, and the costs thereof, together with all other incidental and necessary expenses of the trustees of the sinking fund, shall be paid by said trustees out of funds under their control.

(1) **Old section.**—Compare old §§ 2715 and 2716 R. S., repealed.

**Sec. 104. [Organization of board.]**<sup>1</sup> The trustees of the sinking fund shall immediately after their appointment and qualification elect one of their number as president and another as vice-president, who shall in the absence or disability of the president perform his duties and exercise his powers, and such secretary, clerks or employes as council may provide by an ordinance which shall fix their duties, bonds and compensation; provided, that where no clerks or secretary is authorized, the auditor of the city or clerk of the village shall act as secretary of the board. [1904, April 27, 97 v. 517.]

(1) **Old section.**— Compare old § 2717 R. S., repealed.

**Sec. 105. [Meetings; record of proceedings.]**<sup>1</sup> The trustees of the sinking fund shall make their own rules; but their meetings shall be open to the public, and all questions relating to the purchase or sale of securities, payment of bonds, interest or judgments or involving the payment or appropriation of money shall be decided by a yea and nay vote with the name of each member voting recorded on the journal, and no question shall be decided unless approved by a majority of the whole board.

(1) **Old section.**— Compare old § 2718 R. S., repealed.

**Sec. 106. [Duty of trustees with respect to bonded indebtedness of city.]**<sup>1</sup> The auditor of the city or clerk of the village shall upon demand of the board report to it a full and detailed statement of the outstanding indebtedness of the corporation for bonds issued, and the board shall take charge of and keep a full record of the same and report to council at least once a year a full detailed statement of the same, together with the statement of their investments and general financial business of the city or village which shall be published in any annual report published by the corporation.

(1) **Old section.**— Compare old § 2719 R. S., repealed.



**Sec. 107. [Auditor's or clerk's report to trustees.]**<sup>1</sup> The city auditor or village clerk shall upon demand of the board, report to it balances belonging to the city or village, to the credit of the sinking fund, interest accounts, or for any bonds issued for or by the corporation; and all officers or persons having the same shall immediately pay the same over to the trustees of the sinking fund, who shall deposit them in such place or places as the majority of such board shall select.

(1) **Old section.**—Compare old § 2720 R. S., repealed.

**Sec. 108. [Report of trustees to council; duty of council.]**<sup>1</sup> On or before the first Monday in May of each year the trustees of the sinking fund shall certify to council the rate of tax necessary to provide a sinking fund for the future payment of bonds issued by the corporation and for the payment of final judgments, except in condemnation of property cases, and for the amount necessary for the payment of interest on all bonded indebtedness, and the rents due on all perpetual leaseholds of the corporation not payable from a special fund, and the expenses incident to the management of the sinking fund, and council shall place the several amounts so certified in the tax ordinance before and in preference to any other item and for the full amount certified, and said taxes shall be in addition to all other taxes authorized by law.

(1) **Old sections.**—Compare old §§ 2721 and 2721a R. S., repealed.

**Sec. 109. [How funds to be invested.]**<sup>1</sup> The trustees of the sinking fund shall invest all moneys received by them in bonds of the United States, the State of Ohio, or of any municipal corporation, school, township or county bonds, in said state, hold in reserve only such sums as may be needed for effecting the terms of this act, and all interest received by them shall be reinvested in like manner.

(1) **Old section.**—Compare old § 2722 R. S., repealed.

**Sec. 110. [Payment of obligations.]**<sup>1</sup> The trustees of the sinking fund shall have charge of and provide for the payment of all bonds issued by the corporation, the interest maturing thereon and the payment of all judgments final against the city or village, except in condemnation of property cases. They shall receive from the auditor of the city or clerk of the village all taxes assessments and money collected for said purposes and invest and disburse them in the manner provided by law. For the satisfaction of any obligation under their supervision the trustees of the sinking fund may sell or use any of the securities or money in their possession. [1904, April 27, 97 v. 517.]

(1) **Old section.**— Compare old § 2723 R. S., repealed.

**Sec. 111. [How money to be drawn and deposited.]**<sup>1</sup> Money shall be drawn by check only, signed by the president, and at least two members of the board, and attested by the secretary or clerk. All securities or evidences of debt held by the trustees for the corporation shall be deposited with the treasurer of the corporation or with a safety deposit company or companies within the corporation, or if none exists, then in a place of safety to be indicated or furnished by council, and when so deposited they shall be drawn only upon the application of three members and in the presence of at least two members of the city board, or upon the application and in the presence of at least two members of the village board.

(1) **Old section.**— Compare old § 2724 R. S., repealed.

**Sec. 112. [Power of trustees to investigate transactions affecting sinking fund, etc.]**<sup>1</sup> The trustees of the sinking fund shall have power to investigate all transactions involv-

ing or affecting the sinking fund of [in] any branch or department of the municipal government, and they shall have such other powers and perform such other duties, not inconsistent with the nature of the duties prescribed for them by law, and [as] may be conferred or required by council. [1904, April 27, 97 v. 517.]

(1) **Old sections.**—Compare old §§ 2727 and 2728 R. S., repealed.

**Sec. 113. [Trustees authorized to issue bonds for certain purposes.]**<sup>1</sup> The trustees of the sinking fund for the purpose of refunding renewing or extending the bonded debt at a lower rate of interest or for buying the fee simple of real estate held by the corporation under special leases wherein is secured to the corporation the option to buy the fee simple at a fixed price, and where the money to buy can be procured at a less rate of interest on the price than is represented by the stipulated rents, shall have power to issue the coupon or registered bonds of the corporation for such periods not exceeding fifty years, in such denominations, payable at such place and at such rate of interest not exceeding six per cent., as the trustees may determine; provided, that the aggregate amount of refunding, renewing or extending bonds so issued shall not exceed that of the bonds so refunded, renewed or extended.<sup>2</sup>

(1) **Old section.**—Compare old § 2729a R. S., repealed.

(2) **Character of bonds.**—See *Cincinnati v. Anderson*, 10 C. C. 265, where it was held, under the former § 2729a R. S., that such bonds could not be made payable in gold.

**Competitive bidding required.**—Bonds issued under the above section must be sold to the highest and best bidder after advertisements. The provisions of § 97 of

the Code (old § 2709 R. S.), being *in pari materia*, would govern. *Cincinnati v. Guckenberger*, 60 O. S. 353. For full opinions in lower courts, see 5 N. P., 429; 17 C. C. 115. See also *Roberts & Co. v. Taft*, 109 Fed. 825; 48 C. C. A. 681. See § 115 of the Code.

**Private contracts unauthorized.**—The trustees of the sinking fund were held to have no authority under old § 2729a R. S. to make a private contract for refunding the



bonded debt of the municipality. Cincinnati v. Guckenberger, 60 O. S. 353.

**Duty to provide for interest.**— Sinking fund trustees were held to have no authority to make a con-

tract which would result in the adding of interest to the principal of bonds and refunding the amount so made up, their duty being to take care of the interest as it matures. *Ib.*

**Sec. 114. [Recording of bonds.]** All bonds henceforth issued by any city shall, before they become valid in the hands of any purchaser, be recorded in the office of the sinking fund trustees, and shall bear the stamp of said board of sinking fund trustees, containing the words "Recorded in the office of the sinking fund trustees," signed by the secretary. The record shall show date of issue, for what purpose issued, rate of interest, amount of issue, when due, principal and interest where payable. [1904, April 27, 97 v. 517.]

**Sec. 115. [Signing, attesting, etc.]** All bonds issued by the trustees of the sinking fund <sup>1</sup> shall be signed by the mayor and president of such board of trustees, except that when the mayor of a village is also the president of such board of trustees he shall sign as such mayor and president of the board; attested by the auditor or clerk of the corporation and the secretary of the board of trustees of the sinking fund and have affixed the seal of the corporation issuing them; they shall be sold as provided in section 97 of this act and the trustees of the sinking fund shall have power on demand of the owner or holder of any coupon bond, to issue in lieu thereof a registered bond of the same denomination, bearing the same rate of interest and payable both interest and principal at the same time, and to provide the method of effecting such exchange.

(1) **Forms** of bond and notice of sale. See those given under § 2701 R. S., re-enacted in Code § 96, p. 280,

and § 97 of the Code, p. 285, which may be readily adapted.

## III

## ORGANIZATION OF CITIES.

## 1. LEGISLATIVE.

**Sec. 116.** [Council: number of members; how elected; term.]<sup>1</sup>

The legislative power of every city shall be vested in, and exercised by, a council, composed of not less than seven members, four of whom shall be elected by wards and three of whom shall be elected by the electors of the city at large; provided, that for the first twenty thousand inhabitants in any city, in addition to the original five thousand, there shall be two additional members of council, elected by wards, and for every fifteen thousand inhabitants thereafter there shall be one additional member similarly elected. Provided, further, that whenever the total number of members of council is fifteen or more, one member of every five shall be elected at large, and the remainder from wards.<sup>2</sup> Members of council shall serve for a term of two years and until their successors are elected and qualified.<sup>3</sup>

(1) **Old sections.**—Compare old §§ 1655, 1655a, 1658, 1661, 1672, 1672b, 1673 R. S., all repealed.

(2) **Interpretation of provisions.**—In *Zumstein v. Mullen*, 48 B. 177, 67 O. S. 382, where was under consideration the number of members of council, fixed for Cincinnati, having a population of 325,902, this section was construed as follows:

“ . . . At least 5,000 inhabitants are required to constitute a city, and by the above section a city of 5,000 and under 25,000 inhabitants will have seven members

of council; no more and no less. Where there are 20,000 inhabitants in addition to the original 5,000, two more are allowed, making nine for a city of 25,000, and under 40,000 inhabitants. After passing the 25,000 mark, it is provided that for every 15,000 inhabitants, one additional member shall be elected. Take said first 25,000 from the total population of the city of 325,902 and there will remain 300,902. This divided by 15,000, gives twenty members to be elected by reason of said 300,902 inhabitants. The first 25,000 gave nine members, which added

to the twenty, makes twenty-nine in all as the total for the whole city.

"Now as to the manner of election. The first 25,000 inhabitants gives nine members, six to be elected from wards and three in the city at large. For every 15,000 after the first 25,000 one member is added, to be elected from a ward; but whenever the total number of members reaches fifteen or more, four out of every five are to be elected from wards, and one at large, so that only three would be elected at large so long as the number of members is under twenty, but at twenty, four would be elected at large, and at twenty-five members, five would be elected at large, and it would stand at five until the number of members would reach thirty, but as the total number in Cincinnati is only twenty-nine, only five can be elected at large, and the remainder, twenty-four, from wards."

(3) **Holding until successor qualifies.**—See § 8 R. S. in Part II, providing that any person holding an office of public trust shall continue until his successor is elected or appointed and qualifies, unless otherwise provided by constitution or laws.

Membership in council was held to be an "office" within the meaning of § 8 R. S. State *ex rel. v. Kearns*, 47 O. S. 566, 568.

Where a statute provides that an officer shall serve until his successor is elected and qualified, a failure to elect a successor does not create a vacancy to be filled by appointment under a general authority to fill vacancies, but the incumbent holds over. State *ex rel. v. Wright*, 56 O. S. 540, 556; and the incumbent continues not as a mere *de facto* officer, but as the rightful possessor of the office. State *v. Howe*, 25 O. S. 588, 596.

#### TABLE OF COUNCILMEN IN CITIES UNDER NEW CODE.

(Adopted in *Zumstein v. Mullen*, 48 B. 177; 67 O. S. 382.)

| Pop.    | Total Council. | By Wards. | At Large |
|---------|----------------|-----------|----------|
| 5,000   | 7              | 4         | 3        |
| 25,000  | 9              | 6         | 3        |
| 40,000  | 10             | 7         | 3        |
| 55,000  | 11             | 8         | 3        |
| 70,000  | 12             | 9         | 3        |
| 85,000  | 13             | 10        | 3        |
| 100,000 | 14             | 11        | 3        |
| 115,000 | 15             | 12        | 3        |
| 130,000 | 16             | 13        | 3        |
| 145,000 | 17             | 14        | 3        |
| 160,000 | 18             | 15        | 3        |
| 175,000 | 19             | 16        | 3        |
| 190,000 | 20             | 16        | 4        |
| 205,000 | 21             | 17        | 4        |
| 220,000 | 22             | 18        | 4        |
| 235,000 | 23             | 19        | 4        |
| 250,000 | 24             | 20        | 4        |
| 265,000 | 25             | 20        | 5        |
| 280,000 | 26             | 21        | 5        |



TABLE OF COUNCILMEN IN CITIES UNDER NEW CODE.—*Continued.*

| Pop.    | Total Council. | By Wards. | At Large. |
|---------|----------------|-----------|-----------|
| 295,000 | 27             | 22        | 5         |
| 310,000 | 28             | 23        | 5         |
| 325,000 | 29             | 24        | 5         |
| 340,000 | 30             | 24        | 6         |
| 355,000 | 31             | 25        | 6         |
| 370,000 | 32             | 26        | 6         |
| 385,000 | 33             | 27        | 6         |
| 400,000 | 34             | 28        | 6         |

**Sec. 117. [Council to divide city into wards.]**<sup>1</sup> The council shall, after each recurring federal census, and within three months after the issuance of the proclamation required in section 2 of this act, and whenever there is annexed thereto any territory containing, by the last federal census, such number of inhabitants as will entitle the city to an additional member of the council, subdivide the city into wards, equal in number to the members of the council in such city who are to be elected from wards therein; and all wards shall be bounded, as far as practicable, by county lines, streets, alleys, avenues, public grounds, canals, water courses, corporation lines, center lines of platted streets, or railroads, and be composed of adjacent and compact territory, and as nearly equal in population as practicable;<sup>2</sup> and if the council shall fail to make such subdivision into wards within the time herein required, then the same shall, on the application of the president of the council, be made by the board of public service.

**[Election and term of members of council.]** One member of the council shall be chosen from each ward in each odd numbered year for a term of two years commencing on the first day of January next after his election. (See 126.) [1906, April 16, 98 v. 195.]

(1) **Old sections**,—Old §§ 1628 to 1632 R. S., repealed.

(2) **Redistricting ordinance** after new Federal census or upon an-

nexation of new territory, see form given below. As to construction of such ordinance under a former law, see *State v. Cincinnati*, 3 N. P. 127.

**Duties of councils.**—The old councils in office prior to the first Monday in May, 1903, were required under former § 117 of the Code (1) to subdivide the city into wards, (2) to determine the number of directors of public service and of public safety, respectively, and (3) to fix the salaries and bonds of all officers elected at the first election under the Code and the salaries and bonds of the directors of public safety to be first appointed thereunder. These duties having been performed, the new councils going into office on the first Monday in May, 1903, had the following duties to perform in perfecting the organization of cities: (1) They were required to organize the various departments of the city government, determine the number of assistants, clerks and other subordinate employes in each department (except

the department of public service, health, university and library) and fix their compensation and bonds (§§ 126 and 227 of Code). (2) They were authorized to fix the salaries and bonds of all elective city officers as well as the salaries and bonds of the directors of public safety, not, however, to take effect during the first terms of such officers or directors, the salaries and bonds for such first terms having already been fixed by the old councils (§§ 126 and 117 of the Code). (3) They were required to establish a board of health (§ 187 of the Code).

The powers of present councils in relation to fixing or changing the salaries and bonds of officers and the number of directors of public service and directors of public safety are now found in §§ 126, 227, 138 of the Code.

#### FORM OF ORDINANCE TO RE-DISTRICT CITY AFTER NEW FEDERAL CENSUS OR ANNEXATION OF TERRITORY.

Ordinance No. ....

To subdivide the city of ..... into wards.

Whereas, according to the last federal census, as shown by the proclamation of the secretary of state, the city of ..... has a population of .....; and whereas this council is authorized and directed by law to re-district said city and sub-divide the same into wards, now therefore:

(Or, if by council after annexation of territory: "Whereas, there has been annexed to the city of ....., in the manner provided by law, territory bounded and described as follows (here describe new territory annexed); and whereas, the territory so annexed contained according to the last federal census ..... inhabitants; and whereas by the annexation of said territory the city of ..... is entitled to ..... additional members of council; and whereas, by reason of said annexation, this council is authorized and directed by law to re-district said city and sub-divide the same into wards, now therefore:")

Be it ordained by the council of the city of ....., State of Ohio:

Sec. 1. That the city of ..... be and it is hereby subdivided into ..... wards, which are equal in number to the members of council who are hereafter to be elected from wards according to law, and said ..... wards are hereby created and established in this city, and the boundaries thereof shall be such as are hereinafter set forth, which boundaries are so fixed as that each ward shall contain as nearly as practicable an equal number of inhabitants.

Sec. 2. That the boundaries of the wards shall be as follows:

First Ward. The first ward shall contain all that territory bounded and described as follows: .....

Second Ward. Etc.

Sec. 3. That all ordinances or parts of ordinances inconsistent herewith are hereby repealed, and this ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed.....19....

.....  
President of Council.

Attest:

.....  
Clerk.

# FORM OF ORDINANCE CHANGING THE NUMBER OF DIRECTORS OF PUBLIC SERVICE OR SAFETY.

Ordinance No.....

To fix the number of directors of public service [or public safety].

Be it ordained by the council of the city of.....State of Ohio:

Sec. 1. That the number of directors of public service [or public safety] heretofore fixed and determined for the city of.....is hereby increased [or diminished] to.....,and the number of said directors shall hereafter be.....

Sec. 2. That all ordinances or parts of ordinances inconsistent herewith be repealed, and this ordinance take effect and be in force from and after the earliest period allowed by law.

Passed.....19....

.....  
President of council.

Attest:

.....  
Clerk.

**Sec. 118. [Officers of council.]<sup>1</sup>** The members of council shall, within ten days from the commencement of their term, elect <sup>2</sup> a president *pro tem.*, clerk, who shall also perform the duties of city clerk <sup>3</sup> unless otherwise specified in this act, and such other employes of council as may be necessary, and shall fix their duties, bonds and compensation. The officers and employes of council shall serve for two years, but may be removed at any time for cause, at a regular meeting by a vote of two-thirds of the members elected to council.

(1) **Old sections.**—Compare old §§ 1655a, 1662 and 1676 R. S., repealed.

(2) **Mode of election.**—Where no mode of voting in the organization of council is prescribed, any mode which insures a right to vote

to each member and by which the majority can be fairly ascertained, may be adopted, if not forbidden by law. State *ex rel. v. Green*, 37 O. S. 227. Thus, election may be made by motion. *Id.*



Refusal to vote by members present when election is being held and when their names are called, cannot defeat the election. *Ib.*

A plurality of votes cast was held sufficient to elect. *State ex rel. v. Anderson*, 45 O. S. 196; *State v. Miller*, 62 O. S. 436.

When the choice has been made by such vote it is not necessary to complete the election, that the presiding officer announce the vote. *State v. Miller*, 62 O. S. 436.

After the choice has thus been made no member of council can change the result by changing his vote. *Ib.*

(3) **Clerk**, chosen as here, holds office by election and not by appointment. *State v. Squire*, 39 O. S. 197; *State ex rel. v. Witt*, 72 O. S. 584.

**Duties as to Journal.**—Under

former § 1755 R. S. (repealed), providing the duties of clerk, it was held that the clerk has no power to correct the journal of council, after the council has passed upon the record of its proceedings and mandamus will not lie to compel the clerk to do so. *McClain v. McKisson*, 15 C. C. 517.

**Auditor as city clerk.**—§ 134 of the Code by reference to § 1756 *et seq.* R. S., confers upon the auditor certain duties formerly devolved upon the city clerk; § 224 of the Code confers upon the auditor the duties formerly devolved upon the city clerk by §§ 1737 to 1743 R. S., inclusive.

**Appointments.**—As to power of city clerk, under former statutes, in the matter of appointments, see *Lillard v. Ampt*, 4 N. P. 272.

**Sec. 119.** [Council shall be judge of election and qualifications of its members; quorum; special meetings.]<sup>1</sup> Council shall be the judge of the election and qualification of its members;<sup>2</sup> a majority of all the members elected shall be a quorum to do business,<sup>3</sup> but a less number may adjourn from day to day and compel attendance of absent members in such manner and under such penalties as shall be prescribed by ordinance, and council shall provide rules for the manner of calling special meetings.<sup>4</sup> [1904. April 21, 97 v. 136.]

(1) **Old sections.**—Compare old §§ 1662 and 1679 R. S., repealed.

(2) **Conclusiveness of council's determination.**—Council's determination as to election of members is conclusive and not reviewable by the courts. *Stearns v. Wypmng*, 53 O. S. 352; and *quo warranto* will not lie to oust a member, after council's finding. *State ex rel. v. Berry*, 47 O. S. 232. But the exclusive right of council to judge of the election of its members does not extend to a case where a councilman is as-

suming to act as councilman from a ward which has no legal existence. *State ex rel. v. O'Brien*, 47 O. S. 464; so where councilman is ineligible because not a citizen of the United States. *State ex rel. v. Collier*, 27 C. C. 529; 6 C. C. (N. S.) 33; and *quo warranto* will lie in such cases. *Ib.*

Nor does the exclusive right of council extend to a case where the question is not simply which of two persons has been properly selected

to fill a conceded vacancy, but whether a vacancy does in law exist, which is to be filled by election or appointment. *State ex rel. v. Darby*, 12 C. C. 235 (aff'd, 52 O. S. 611).

(3) **Quorum.**—Where a member of council has removed from his ward and thus, under the statutes and a municipal ordinance, left a vacancy, the number of members of council may be regarded as reduced thereby, and a quorum will consist of a majority of all the members elected and remaining qualified. *State ex rel. v. Orr*, 61 O. S. 384.

(4) **Special meetings.**—In the absence of statutory or other provisions relating to special meetings or notice thereof, action taken at a special meeting where a quorum is present and where the proper number of all members elected concur, is not invalid, because some members were not present and were not notified of the meeting. *State ex rel. v. Bowers*, 26 C. C. 326; 4 C. C. (N. S.) 345 (aff'd, 70 O. S. 423); see also *Cupp v. Commissioners*, 19 O. S. 173, 180; *State v. Wilkesville*, 20 O. S. 288.

See, as to manner of calling special meetings, § 123.

### Sec. 120. [Qualifications of members of council; vacancies.]<sup>1</sup>

Councilmen at large shall have resided in their respective cities, and councilmen from wards shall have resided in their respective wards, for at least one year next preceding their election. Every member of council shall be an elector of the city, shall not hold any other public office or employment,<sup>2</sup> except that of notary public or member of the state militia, and shall not be interested in any contract with the city.<sup>3</sup> Any member who shall cease to possess any of the qualifications herein required, or shall remove from his ward, if elected from his ward, or from the city, if elected from the city at large, shall forthwith forfeit his office.<sup>4</sup> Whenever the office of councilman becomes vacant the same shall be filled by election by council for the unexpired term,<sup>5</sup> and in case council fail within thirty days to fill such vacancy, the mayor shall fill the same by appointment.

(1) **Old sections.**—Compare old § 1680 R. S., repealed (members must be residents); § 1681 R. S., repealed (must not hold other municipal office); § 1715 R. S., repealed (removal of officer from corporation, a resignation); § 1655a R. S., repealed (member of board of legislation not to be interested in contract); § 1717 R. S., repealed (councilmen ineligible to any other office); § 1724 R. S., repealed (filling vacancies).

(2) **Holding other office.**—*Construction.*—The words in former § 1717 R. S., repealed, "no member of council shall be eligible to any other office, etc.," were construed to mean any other municipal office and not to prevent a councilman from holding an office not municipal. *State ex rel. v. Kinney*, 20 C. C. 325. See further, *State ex rel. v. Brown*, 60 O. S. 499.

So, a member of council was held eligible to election as member of

school board of a special school district. *State ex rel. v. Kinney*, 20 C. C. 325. But see *contra*, *State ex rel. v. Keeler*, 19 C. C. 149, and *State ex rel. v. McMillan*, 15 C. C. 163.

Councilman was held eligible to election as county commissioner. *State ex rel. v. Brown*, 60 O. S. 499.

A workhouse director was held ineligible to council. Commissioners *v. Cambridge*, 7 C. C. 72.

Councilman ineligible to appointment as member of city decennial board of equalization. *State ex rel. v. Kearns*, 47 O. S. 566.

Councilman held ineligible to appointment as member of board of health. *State ex rel. v. Craig*, 69 O. S. 236.

**Effect of holding other office.—**

The appointment of member of council to an office he is ineligible to fill does not work an abandonment of his office as councilman. The appointment to the second office is simply void. *State ex rel. v. Kearns*, 47 O. S. 566; *State v. Newark*, 6 N. P. 523; *State ex rel. v. Craig*, 69 O. S. 236, 244. So the election to council of one already holding an office which would make him ineligible to be a councilman would not work an abandonment of the first office, but the election to council would be void. Commissioners *v. Cambridge*, 7 C. C. 72.

Whether appointments made by officers illegally holding their offices are void, *quer.* *State ex rel. v. Craig*, 69 O. S. 236, 244.

(3) **Interested in contract.—** Compare provisions in § 45 of the Code, and see note thereunder, p. 177.

(4) **Change of boundary.—** Effect of change of ward boundaries, see *State v. Choate*, 11 O. 511; *Scovill v. Cleveland*, 1 O. S. 126.

**Effect of removal.—**Where member has removed from the ward the office is vacant and the number of members of council is reduced accordingly. *State ex rel. v. Orr*, 61 O. S. 384. In such case, a majority of members elected to council, will consist of a majority of those remaining qualified. *Ib.*

(5) **Filling vacancies.—Term of**

*appointee.*—Under former statutes, where one section provided that an appointee to fill a vacancy in council should be appointed "for the unexpired term" and another section provided that all persons appointed to fill vacancies in municipal offices should serve "till the next annual municipal election," it was held that the former, being specially applicable to council, would govern as to appointments in that body, and such appointee would hold for the unexpired term. *State ex rel. v. Darby*, 12 C. C. 235 (affirmed, 52 O. S. 611).

An officer appointed to fill the unexpired term would hold until his successor is elected and qualified. See *State ex rel. v. Darby*, *supra*, holding that § 8 R. S. providing that all officers shall serve till successors are chosen and qualify would apply to a councilman chosen to fill an unexpired term.

A misapprehension as to the true tenure of the appointee on the part of the appointing power or on the part of the appointee cannot abridge or extend the term fixed by law for his continuance in office. *State ex rel. v. Darby*, *supra*; *State ex rel. v. Slough*, 12 C. C. 105, 111.

See generally as to term of appointee to fill vacancy, notes under § 228 of the Code.

For discussion of question of applicability of § 11 R. S. containing general provisions as to term of appointees to fill vacancies, where there are special statutes for the particular office, see *State ex rel. v. McGregor*, 44 O. S. 628; *State v. Barbee*, 45 O. S. 347.

**When vacancy exists.—**Where a member of council is ousted by *quo warranto* proceedings, on the ground that the ward he claims to represent has no legal existence, no



vacancy exists. *State ex rel. v. Kearns*, 47 O. S. 566.

The power of council to judge of election of members, does not in-

clude the power to determine whether a vacancy does, in law, exist.

*State ex rel. v. Darby*, 12 C. C. 235 (affirmed, 52 O. S. 611).

**Sec. 121.** [Rules, journal, expulsion of members.]<sup>1</sup> Council shall determine its own rules and keep a journal of its proceedings.<sup>2</sup> It may punish or expel any member for disorderly conduct, or violation of its rules, and declare his seat vacant for absence without valid excuse, where such absence has continued for two months; but no expulsion shall take place without the concurrence of two-thirds of all the members elected, and until the delinquent member shall have been notified of the charge or charges against him, and shall have had an opportunity to be heard.<sup>3</sup>

(1) **Old sections.**—Compare old §§ 1679 and 1684 R. S., repealed.

(2) **Power of council over journal.**—In the absence of fraud or bad faith, the council has the right to determine when its journal truly sets forth its proceedings and its action in correcting the journal is final and conclusive, and not subject to review by the courts. *McClain v. McKisson*, 15 C. C. 517.

As to attacking record of a board collaterally, see generally, *Lima v. McBride*, 34 O. S. 338, 351 and cases cited; *State v. Gas Co.*, 18 O. S. 262.

(3) **Removal from office.**—For provisions as to removal of officers by Probate Court, see §§ 1732-1736 R. S., inclusive, in Part II; and see *Dorgan v. Columbus*, 12 Dec. 121; *State ex rel. v. Ganson*, 58 O. S. 313.

As to what is misconduct in office, see *State ex rel. Sutton*, 4 B. 608; *State ex rel. v. Roll*, 7 W. L. J. 121.

Character of charges and finding, see *State v. Sullivan*, 58 O. S. 504.

As to removal of officers upon charges preferred by the mayor, see § 225 of the Code and notes.

**Sec. 122.** [Ordinances and resolutions; how adopted.]<sup>1</sup> The action of council shall be by ordinance or resolution,<sup>2</sup> and on the passage of every ordinance or resolution the vote shall be taken by "yeas" and "nays," and entered upon the journal;<sup>3</sup> provided, however, that this shall not apply to the ordering of an election, or direction by council to any board or officer to furnish council with information as to the affairs of any depart-

ment or office. No ordinance or resolution granting a franchise,<sup>4</sup> or creating a right, or involving the expenditure of money, or the levying of any tax, or for the purchase, lease, sale, or transfer of property,<sup>5</sup> shall be passed, unless the same shall have been read on three different days, and with respect to any such ordinance or resolution, there shall be no authority to dispense with this rule, except by a three-fourths vote of all members elected thereto.<sup>6</sup> No ordinance shall be passed by council without the concurrence of a majority of all members elected thereto.<sup>7</sup>

(1) **Old section.**—See old § 1693 R. S., repealed, and compare old § 1655a R. S., repealed.

(2) **Cannot act separately.**—Corporate acts cannot be performed by individual members of a board acting separately. State *ex rel.* v. Liberty Twp., 22 O. S. 144; McCortle v. Bates, 29 O. S. 419.

**Character of ordinances.**—Ordinances are binding on strangers coming into the municipality. Marietta v. Fearing, 4 O. 427.

An ordinance making a contract gives parties to it vested rights which cannot be impaired by a repeal of the ordinance. Lima Gas Co. v. Lima, 4 C. C. 22.

To impose liability on the municipality because of its ordinance the statute as to passage, etc., must be followed. Wellston v. Morgan, 65 O. S. 219.

Oral evidence that ordinance was passed, was held admissible to prove it, if the records did not show its passage. Drott v. Riverside, 4 C. C. 312.

**Limitations on power of council.**—Council has only the powers granted, and no others; its proceedings must be within the powers conferred and in substantial conformity to the statutes regulating

them. Gas and Water Co. v. Elyria, 57 O. S. 374.

See further, notes under § 7 of the Code, p. 43.

Power granted to council, other than mere ministerial power, cannot be delegated. Hengst v. Cincinnati, 7 N. P. 1; Ampt v. Cincinnati, 3 N. P. 223.

**Ordinances do not determine civil rights** between individuals. Municipal ordinances declaring certain acts to be nuisances, or permitting nuisance to exist, do not create or protect from, civil liability between individuals. Chambers v. Ins. Co., 1 Disney, 327, 336; Vandyke v. Cincinnati, 1 Disney, 532; Veigel v. Lunkenheimer, 10 B. 293; Clark v. Fry, 8 O. S. 358. Ordinances regulating speed of steam or street railway cars in the streets do not determine civil liability between individuals, but may go to jury on question of negligence. Meek v. Pennsylvania Ry. Co., 38 O. S. 632; Ry. Co. v. Herrick, 49 O. S. 25, 32; Becker v. St. Ry. Co., 1 N. P. 359. But violation of a speed ordinance is not negligence *per se*. Meek v. Pennsylvania Railway Company, 38 O. S. 632; Bell v. Pistorius, 18 C. C. 73. See

also Hoppe v. Parmalee, 20 C. C. 303; L. S. & M. S. R. R. Co. v. Ehler, 19 C. C. 177; Ulrich v. Toledo Consol. St. Ry. Co., 10 C. C. 635; C. H. & D. Ry. Co. v. Murphy, 17 C. C. 223; Watson v. Erie R. R., 8 N. P. 18; Ry. Co. v. Trainer, 18 C. C. 716; East Cleveland R. R. v. Rosecrans, 24 B. 220; Hart v. Devreux, 41 O. S. 565.

**Distinction between ordinance and resolution.**—An act required to be done by ordinance, is sufficiently done by legislation amounting to an ordinance, though called a resolution. Kerlin Bros. v. Toledo, 20 C. C. 603. So an ordinance may be valid as a resolution, where resolution is required. *Ib.*

Action of council, though in the form of an ordinance may have the effect of a resolution, without the signature of the presiding officer. Blanchard v. Bissell, 11 O. S. 96, 101.

When the action of council could have been taken by a motion or order, the mere fact that its action has taken the form of a resolution does not require all the formalities incident to a resolution to make it valid. Kerlin Bros. v. Toledo, 20 C. C. 603.

**When required.**—Waiver of performance of a contract was held, under former laws, not to require an ordinance or resolution. Hubbard v. Norton, 28 O. S. 116. Appointment of committee to effect a compromise of a suit need not be by resolution or ordinance. Commissioners v. Cambridge, 7 C. C. 72. Where action of council extends over a long period and consists of a number of steps, the intent may be gathered from the whole proceedings, and it is not absolutely essential that each step be formally taken. *Ib.*

**Construction.**—Ordinances are to be construed so as to carry out the intention. Cleveland v. Lenze, 27 O. S. 383, 390. The same rules that govern the construction of statutes are to be applied. Lowden v. Cincinnati, 2 Disney, 203, 207.

Resolution directing lot owners to fill lots, will be construed to require filling in such way as will prevent recurrence of the nuisance. Bliss v. Kraus, 16 O. S. 54.

**Practical construction by conduct of parties.**—An ambiguous grant is not necessarily to be construed most strongly against the one claiming the franchise, and construction by conduct, as by later ordinances, may apply. R. R. Co. v. Cincinnati, 16 B. 367. Where the terms of an ordinance granting a franchise are unambiguous, there is no room for construction by conduct of the parties; nor does the rule of construction by practice apply when the acts relied upon are not those of the officers making the contract, but of subsequent or other officers or agents of the municipality. Cincinnati v. Cin. St. Ry. Co., 6 N. P. 140, 8 N. P. 80; Cincinnati v. Gas Light and Coke Co., 53 O. S. 278.

**Validity — In general.** — Presumption is in favor of the validity of ordinances. Moerder v. Fremont, 19 C. C. 394. Fraud and malice are not to be imputed to council, but the immunity from impeachment for fraudulent motives does not attach to all acts of council which may assume the form of an ordinance. State v. Gas Co., 18 O. S. 262, 301.

The provision of the Constitution vesting legislative power in the legislature is not violated by granting to councils of municipalities the power to pass ordinances. Markle v. Akron, 14 O. 586.



Stating penalty in different section from that describing offenses, does not invalidate. *Brown v. Toledo*, 7 N. P. 435.

Misnomer of the municipality is not fatal if the meaning is clear. *McCrea v. Washington*, 18 B. 66.

A court may correct error in punctuation. *Chittenden v. Columbus*, 26 C. C. 531; 5 C. C. (N. S.) 84.

An ordinance is not void for uncertainty because the boundaries of streets of the district mentioned in it do not meet and that it gives one of the boundaries as a river without mentioning what river. *Chittenden v. Columbus*, 26 C. C. 531.

An ordinance is not invalid because it incorporates by reference a previous ordinance not properly passed. Such new ordinance is not amendatory of first ordinance. *Columbus v. Federal Gas & Fuel Co.*, 14 Dec. 261 (aff'd 72 O. S. 632).

Reconsideration of ordinances and resolutions, see *Adkins v. Toledo*, 27 C. C. 417; 6 C. C. (N. S.) 433.

**Ordinance partly void.**—An ordinance may be partly void, and the rest valid, if the rest is separable. *Piqua v. Zimmerlin*, 35 O. S. 507; *Weaver v. Mt. Vernon*, 7 N. P. 374; *Steuer v. McConnell*, 8 N. P. 205; *Chittenden v. Columbus*, 26 C. C. 531; 5 C. C. (N. S.) 84; *Sterling v. Bowling Green*, 26 C. C. 581; 5 C. C. (N. S.) 217.

But if the valid part depends on and is practically inseparable from the void part, the whole will be void. *Cincinnati St. Ry. v. Smith*, 29 O. S. 291; *Hengst v. Cincinnati*, 7 N. P. 1.

Ordinance granting franchise for longer than legal period may be

valid for legal time. *Sommers v. Cincinnati*, 8 Rec. 612.

**Ordinance indefinite.**—An ordinance forbidding "dense" smoke is void. *Cin. v. Neff*, 29 B. 364. But an ordinance merely requiring lot owners to "fill lots" is not void for uncertainty, because it does not prescribe the method of filling. *Bliss v. Kraus*, 16 O. S. 54.

An ordinance is not void because hard to comply with, if compliance is possible. *Cincinnati v. Miller*, 29 B. 364.

**Inconsistent with constitution or statute.**—Ordinances repugnant to the policy and spirit of the Constitution or general statutes are void. *Canton v. Nist*, 9 O. S. 439; *Cincinnati v. Rice*, 15 O. 225; *Thompson v. Mt. Vernon*, 11 O. S. 688.

**Statute on same subject.**—An ordinance is not invalid because there is a statute covering the same subject. *State v. Ulm*, 7 N. P. 659. But the ordinance must contain the exceptions in the statute. *Akerman v. Lima*, 7 N. P. 92; *Canton v. Nist*, 9 O. S. 439. But where direct statutory authority for ordinance in question, and exceptions in other statutes, see *Edis v. Butler*, 8 N. P. 183 (aff'd 68 O. S. 645). See also *Wellsville v. O'Connor*, 24 C. C. 689; *I. C. C. (N. S.)* 253.

**Judicial review.**—In the absence of bad faith or fraud, the discretion of council in passing ordinance will not be interfered with by the courts. *Iron R. R. v. Ironton*, 19 O. S. 299, 304; *Sims v. Street R. R. Co.*, 37 O. S. 556; *R. R. Co. v. Dayton*, 23 O. S. 510.

But if council has acted in bad faith and this is clearly averred, the

court may inquire into the motives. *State v. Cincinnati Gas, etc., Co.*, 18 O. S. 262; *State ex rel. v. Gas Co.*, 37 O. S. 45.

And when the action of council depends for its validity on a condition precedent imposed by statute, its decision that such condition has been observed is not conclusive against direct attack. *Roberts v. Easton*, 19 O. S. 78, 86.

But when council has acted, the presumption is, in the absence of evidence to the contrary, that it has acted lawfully, and all prerequisites to its action were complied with. *Dalrymple v. State*, 26 C. C. 562; 5 C. C. (N. S.) 185; *Reynolds v. Schweinefus*, 27 O. S. 311; see also *Coombs v. Lane*, 4 O. S. 112; *Ward v. Barrows*, 2 O. S. 241; but see *In re Huntsville Local Option Election*, 25 C. C. 535.

(3) **Yea and nay vote.**—Several ordinances cannot be passed on one call for votes. *Sullivan v. Pausch*, 5 C. C. 196; *Campbell v. Cincinnati*, 49 O. S. 463.

Appointment of committee to effect a settlement of litigation need not be made by yea and nay vote. *Commissioners v. Cambridge*, 7 C. C. 72.

Whether action in the organization of council requires a yea and nay vote, *quere*. See *State ex rel. v. Green*, 37 O. S. 227, 230.

Where the journal shows that a certain resolution was adopted by a certain number of votes and this number corresponds with the number of those present, it will be presumed that all present voted yes, and such vote and record is sufficient. *Blair v. Cary*, 24 C. C. 560.

**Passage how proved.**—If record does not show passage of ordinance, oral evidence may be introduced. *Drott v. Riverside*, 4 C. C. 312.

(4) **Ordinance "granting a franchise."**—For consideration of the meaning of this phrase, see *State ex rel. v. Henderson*, 38 O. S. 647; *Morrow County v. Mt. Gilead*, 8 N. P. 669.

A preliminary ordinance designating a route for a proposed street railway and providing for advertisement for bids was held not to be an ordinance granting a franchise. *Id.*; see also *Aydelott v. Cincinnati*, 11 C. C. 11, 17.

**Ordinance "creating a right."**—For full discussion, see *State v. Barr*, 5 N. P. 435. See also *In re Euclid Ave. Assessment*, 6 N. P. 160.

**Ordinance "involving expenditure."**—It is not every ordinance that may result in the expenditure of money, that is intended to be included, but only such as directly involve such expenditure. *State ex rel. v. Henderson*, 38 O. S. 644.

So a preliminary ordinance providing for bids for street railway route was held not an ordinance "involving expenditure of money." *Id.*

Ordinance increasing the number of police officers and fixing their salaries, held to be one involving expenditure of money. *State v. Barr*, 5 N. P. 435.

(5) **Sale or lease of property.**—See §§ 23 to 27 of the Code and notes thereunder, pp. 103, 104, 109.

(6) **Three readings.**—For matter relating to the requirement of three readings, see notes to § 1694 R. S. p. 318.

(7) **Majority.**—When legally elected members are less than total number of which council might consist, whether a majority of such members is a majority of council, *quere*. *Commr's v. Cambridge*, 7 C. C. 72.

When there is a vacancy in council (as where a member removes from his ward and is therefore deemed to have resigned his office), a quorum will consist of all the members elected and remaining qualified. *State ex rel. v. Orr*, 61 O. S. 384.

There need not be a majority of members elected to appoint committee to effect compromise of suit. *Commr's v. Cambridge*, 7 C. C. 72.

**Sec. 123. [Powers of council.]**<sup>1</sup> The powers of council shall be legislative only, and it shall perform no administrative duties whatever and it shall neither appoint nor confirm any officer or employe in the city government except those of its own body, except as may be otherwise provided in this act.<sup>2</sup> All contracts requiring the authority of council for their execution shall be entered into and conducted to performance by the board or officers having charge of the matters to which they relate, and after authority to make such contract has been given and the necessary appropriation made, council shall take no further action thereon.<sup>3</sup>

**[Regular meetings; meetings open to public; special meetings.]** The council shall not be required to hold more than one regular meeting in each week; and the meetings may be held at such time and place as may be prescribed by ordinance and shall, at all times, be open to the public, and the mayor, or any three members may call special meetings upon at least twelve hours notice to each member, served personally, or left at his usual place of residence. [1906, April 4, 98 v. 88.]

(1) **Old section.**—Compare old § 1655a R. S., repealed.

(2) **Purpose of restriction.**—Under former statutes, containing the prohibition that council should exercise no appointing power, it was said that the statutory prohibition “was, doubtless, intended, as it is certainly well calculated, to relieve the municipal legislature from the distracting and corrupting influences almost necessarily issuing from the dispensation of official and pecuniary patronage; and places the municipal legislature, in respect to the appointing power, in a position substantially similar to that in which the General Assembly of the State is placed by the Constitution of the State.” *Bellows v. Cincinnati*, 11 O. S. 544, 547. Such a restriction is intended to “emphasize the purpose that the respective executive, legislative and administrative functions of the city

government should be distinct and independent of one another.” *Lillard v. Ampt*, 4 N. P. 305.

**Construction.**—As to question under former statutes, of what would be considered an exercise of appointing power, within the meaning of such a restriction, see *Lillard v. Ampt*, 4 N. P. 305 and *Bellows v. Cincinnati*, 11 O. S. 544.

(3) **Proper officers must execute municipal contracts** and the power to make public contracts cannot be delegated by one board or officer to another. *Knauss v. Columbus*, 13 Dec. 200.

**Street improvements.**—After council has made appropriation for street improvement it is without further authority in the matter. The letting of the contract, the supervision and control of the work, are with the Board of Public Service. *State ex rel. v. Roebuck*, 15 Dec. 400.



**Sec. 124.** [Provisions of Revised Statutes which govern ordinances; publication of ordinances, resolutions, reports, statements, etc.] In passing, recording, publishing and authenticating ordinances, council shall be governed by the provisions of sections 1694, 1695,<sup>1</sup> 1696, 1697, 1698 and 1699 of the Revised Statutes of Ohio, and for all purposes such sections shall be and remain in full force and effect; and in addition thereto all ordinances and resolutions requiring publication shall be published in two newspapers of opposite politics,<sup>2</sup> published and of general circulation in such municipality, if such there be, and shall be published in a newspaper printed in the German language if there be in such municipality such a paper having a *bona fide* paid circulation within said municipality of not less than one thousand copies. Proof of such circulation shall be made by the affidavit of the proprietor or editor of such paper, which shall be filed with the city clerk of such municipality. Except as otherwise provided in this act, in all municipal corporations the statements, ordinances, resolutions, orders, proclamations, notices and reports required by this act,<sup>3</sup> or the ordinances of any municipality to be published, shall be published in two newspapers of opposite politics of general circulation therein, if there be such in the municipality, and for the following times: The statement of receipts and disbursements required shall be published once, the ordinances and resolutions once a week for two consecutive weeks, proclamations of elections once a week for two consecutive weeks, notices of contracts<sup>4</sup> and of sale of bonds<sup>5</sup> once a week for four consecutive weeks;<sup>6</sup> all other matters shall be published once.

(1) See note (2) under § 1695 R. S., p. 321.

(2) **Papers of opposite politics.**—Under such a provision as this, it has been held that an independent paper, though generally supporting a political party, does

not satisfy the requirement. *Ohio State Journal v. Brown*, 19 C. C. 325; *Columbus v. Barr*, 27 C. C. 264; 6 C. C. (N. S.) 151.

**English newspapers.**—In the absence of requirements to the contrary, publication in newspapers

means English newspapers. *Cincinnati v. Bickett*, 26 O. S. 49.

(3) **Interpretation of provision.**—This provision should not be construed to make it mandatory on municipal authorities to publish statements, orders, etc., not otherwise required to be published. Opinion of attorney-general on file in his office, dated Dec. 3, 1902.

(4) **Notices of contracts.**—§ 143 of the Code requires advertisement for bids within the department of public service for "not less than two nor more than four consecutive weeks in a newspaper of general circulation," etc. A compliance with the requirements of § 124 will include compliance with § 143.

(5) **Sale of bonds.**—§ 97 of the Code requires advertisement for sale of bonds for thirty days in at least two newspapers of general circulation, etc. An advertisement for thirty days and in two newspapers of opposite politics and of general circulation in the municipality would comply with the requirements of §§ 97 and 124.

(6) **Length of publication.**—As to meaning of "once a week for two consecutive weeks," see *Early*

*v. Doe*, 16 How. (U. S.) 610; *Cincinnati v. Fenner*, 8 N. P. 342.

Where the statute provides for the number of publications, publications in excess of the limit fixed are unauthorized, and payment for the same is illegal. *Printing Co. v. State*, 68 O. S. 362; contra, *Wassem v. Cincinnati*, 2 C. S. C. R. 84. But a claim for such excessive publications having been allowed and payment made, money cannot be recovered back in absence of fraud or mistake of fact. *Printing Co. v. State*, 68 O. S. 362.

But excessive publication does not invalidate the ordinance. *Ib.*; *Cincinnati v. Davis*, 58 O. S. 225, 237.

The publication is legal although the newspaper is printed only on Sunday. *Hastings v. Columbus*, 42 O. S. 585.

Where publication is required to be made in "some newspaper" a discretion would seem to be given and publication might be made in more than one paper. *Cincinnati v. Davis*, 58 O. S. 225, 237. See also *Wassem v. Cincinnati*, 2 C. S. C. R. 84,

**Sec. 1694 R. S.** [Must be read three times, unless, etc.; subject and amendment of by-laws, etc.] By-laws, resolutions and ordinances of a general or permanent nature, shall be fully and distinctly read on three different days, unless three-fourths of the members elected dispense with the rule;<sup>1</sup> and the vote on such suspension shall be taken by yeas and nays, separately on each by-law, resolution or ordinance, and entered on the journal. No by-law or ordinance shall contain more than one subject,<sup>2</sup> which shall be clearly expressed in its title, and no by-law or ordinance, or section thereof, shall be revived or amended, unless the new by-law or ordinance contain the entire by-law or ordinance, or section revived or amended; and the by-law or ordinance, section or sections so amended shall be repealed;<sup>3</sup> and every such by-law, resolution and ordinance shall be adopted or passed by a separate vote of the council and the yeas and nays shall be entered upon the journal. [90 v. 136; 87 v. 36; 66 v. 166, §§ 98, 99; (S. & C. 1521).]

(1) **Requirement mandatory.**—The requirement that certain ordinances shall have three readings, unless dispensed with by three-fourths vote is mandatory. *Campbell v. Cincinnati*, 49 O. S. 463;

*Weaver v. Mt. Vernon*, 7 N. P. 374; *Bloom v. Xenia*, 32 O. S. 461.

A vote on the passage of an ordinance not read on three different days or the rule dispensed with as required by law, when the ordinance

is one of a general or permanent nature, is simply a nullity. *Smith v. Railroad Co.*, 8 N. P. 1.

So a vote against an ordinance before the three readings had been completed or properly dispensed with, is a nullity and does not prevent passage after three readings. *Smith v. Columbus, etc., Ry Co.*, 8 N. P. 1.

**What is ordinance of a general or permanent nature.**—Ordinance to condemn property for street purposes or to improve a street was held to be an ordinance of a general or permanent nature requiring three readings. *Campbell v. Cincinnati*, 49 O. S. 463.

So was a resolution to issue bonds to procure water works and submit the question to popular vote. *Gas and Water Co. v. Elyria*, 57 O. S. 374.

So was a resolution requiring a sidewalk in front of a single piece of property. *Thatcher v. Toledo*, 19 C. C. 311; *Cincinnati v. Johnson*, 18 C. C. 611; *McGuire v. East Cleveland*, 1 C. C. (N. S.) 435, 438; 25 C. C. 497.

As to resolution declaring necessity of street improvement, see *Campbell v. Cincinnati*, 49 O. S. 463; *Thatcher v. Toledo*, 19 C. C. 311, 315; *Upington v. Oviatt*, 24 O. S. 232.

A resolution awarding a contract for the improvement was held not of a general or permanent nature. *Cincinnati v. Bickett*, 26 O. S. 49.

Nor authorizing a committee to effect a settlement of litigation. *Commissioners v. Cambridge*, 7 C. C. 72.

Nor an ordinance for lighting streets and assessing the costs. *Federer v. Dayton*, 1 Dayton, 142.

Nor a preliminary resolution amounting to a mere order or direction to the clerk to advertise for bids for sale of part of a natural gas plant. *Kerlin Bros. v. Toledo*, 20 C. C. 603.

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A resolution to be one of a general or permanent nature must be a necessary resolution, that is, it must be not only a necessary step toward the ultimate object but it must be a step which cannot be otherwise taken. *Kerlin Bros. v. Toledo*, 20 C. C. 603.

**When readings may be had.**—An ordinance twice read may go on the third reading after an election which brings new members into council. *Smith v. Columbus, etc., Railway*, 8 N. P. 1.

But a second reading will not be valid where it was at a special meeting for which notice had not been properly served. *Shaw v. Jones*, 4 N. P. 372.

**Suspension of rules.**—More than one ordinance cannot be passed under a single suspension of rules. *Bloom v. Xenia*, 32 O. S. 461. *Campbell v. Cincinnati*, 49 O. S. 463; *Sullivan v. Pausch*, 5 C. C. 196.

But the rule need not be suspended before each reading. A single suspension of the rules before first reading is sufficient. *Purcell v. Riverside*, 1 C. C. 12.

A suspension of the rules allows passage on one day and one reading. *Shroder v. Overmann*, 5 N. P. 392.

Suspension of rules may be had at an adjourned meeting and the ordinance put on its passage when suspension of rules was not had at the regular meeting. *Madden v. Smeltz*, 2 C. C. 168.

**Amendments** made during the passage of an ordinance which do not materially change its provisions are not within the rule requiring three readings. *Weaver v. Mt. Vernon*, 7 N. P. 374; *Mohn v. Collins*, 32 B. 77; *Chillicothe v. Gas & Fuel Co.*, 8 N. P. 88.



(2) **More than one subject.**— Provision directory. *Pim v. Nicholson*, 6 O. S. 176; *State v. Covington*, 29 O. S. 102. See also *Circle-ville L. & P. Co. v. Buckeye Gas Co.*, 24 C. C. 684, 685.

If one of two subjects is separable the whole ordinance will not be invalid. *McCrea v. Washington*, 18 B. 66.

Provision is not violated by an ordinance defining fifteen offenses against the municipality but all relating to the one subject of the punishment of offenses against the municipality. *Wellsville v. O'Connor*, 24 C. C. 689; 1 C. C. (N. S.) 253

**Different subjects.**— Resolution to increase capacity of water works and to construct electric light plant in connection therewith, submitting the question to popular vote, was held not to contain two subjects. *Ryan v. Orbinson*, 7 C. C. 30.

An ordinance granting a franchise to use the streets for electric light and power purposes and also making a contract for lighting the streets of the city, contains more than one subject. *Morrow Co., etc., v. Mt. Gilead*, 8 N. P. 669.

So does a resolution for issuing bonds "for purchasing or constructing" gas wells. *Hensly v. Hamilton*, 3 C. C. 201.

So does a resolution providing for the purchase of water works and also the erection of new ones. *Gas and Water Co. v. Elyria*, 57 O. S. 374.

(3) **Repeals by implication.**— A similar provision in the Constitution that "the section so amended shall be repealed" was held directory and not to abrogate the rule as to repeals by implication. *Lehman v. McBride*, 15 O. S. 573.

A resolution declaring the necessity of constructing water works will be repealed by implication by resolution declaring the necessity for purchase of water works already constructed. *Johnson v. Elyria*, 6 N. P. 372.

An ordinance intended to repeal a prior one but referring to it merely by its caption will repeal the entire prior ordinance, although the caption is not the same as the language used in the body of the ordinance. *Cincinnati Street Ry. Co. v. Lewis*, 23 C. C. 127; 3 C. C. (N. S.) 115.

An ordinance which council has power to pass may be passed contrary to the provisions of a previous ordinance, thus ignoring the previous ordinance and repealing it by implication. *Aydellott v. Cincinnati*, 11 C. C. 11.

**Sec. 1695 R. S.** [Recording and publishing by-laws, ordinances, etc.; publication in book form sufficient.] By-laws, resolutions and ordinances shall be authenticated by the signature of the presiding officer and clerk of the council.<sup>1</sup> Ordinances of a general nature, or providing for improvements shall be published in some newspaper of general circulation in the corporation; if a daily, twice and if a weekly once, before going into operation.<sup>2</sup> No ordinance shall take effect until the expiration of ten days after the first publication of such notice.<sup>3</sup> And as soon as any by-law, resolution or ordinance is passed and signed, it shall be recorded by the clerk in a book to be furnished by the council for the purpose,<sup>4</sup> provided that whenever ordinances shall be revised, codified, re-arranged and published in book form and certified as correct by the city or village clerk and the mayor thereof, such publication in book form shall be taken and held to be in lieu of publishing the

same in a newspaper or newspapers as required by law, and shall be a sufficient publication to all intents and purposes, and the ordinance or several ordinances so published in book form, under appropriate titles, chapters and sections, shall be held the same in law as though they had been published in a newspaper or newspapers, provided that any new ordinance so published in book form, which has never been published according to law, and which contains entirely new matter shall be published as heretofore required by law.<sup>5</sup> [1883, February 22: 80 v. 26; 67 v. 68, § 100; (S. & S. 797; S. & C. 1525).]

(1) **Signature of presiding officer** was held not necessary to the validity of an ordinance. Toledo, etc., Railway v. Toledo, etc., Railway, 6 C. C. 362 (affirmed on other grounds, 50 O. S. 603), Blanchard v. Bissell, 11 O. S. 96.

(2) **Length of publication.**—Notwithstanding this provision, the better practice would be to publish ordinances of a general nature or providing for improvements once a week for two consecutive weeks and in the newspapers required by § 124 of the Code, since this would include the requirements of § 1695 R. S.

**Publication in general.**—Not invalid because made in a newspaper published only on Sunday. Hastings v. Columbus, 42 O. S. 585.

Publication is not necessary of the action of council not required to be done by resolution or ordinance. Kerlin Bros. v. Toledo, 20 C. C. 603.

Publication for a longer time than required by statute will not be a

misapplication of public funds. Wasem v. Cincinnati, 2 C. S. C. R. 84. Nor does excessive publication invalidate the ordinance. Cincinnati v. Davis, 58 O. S. 225, 237.

(3) **When ordinances take effect.**—An action authorized by the ordinance cannot be taken on the tenth day, but only after the tenth day. Fath v. Clifton, 7 N. P. 534.

If the ordinance requires a notice for a certain length of time that length of time must expire in addition to the ten days before action can be taken. Hensly v. Hamilton, 3 C. C. 201.

Council may provide, subject to the statutory provision, when an ordinance shall take effect, whether it be an ordinance of a general nature or not. Hensly v. Hamilton, 3 C. C. 201.

(4) **Record in separate book** is not essential to validity of ordinance. This provision is directory only. Upton v. Oviatt, 24 O. S. 232.

(5) See Sec. 124a, page 324.

**Sec. 1696 R. S. [Statement as to publication.]** Immediately after the expiration of the period of such publication, the clerk shall enter on the record of ordinances, in a blank to be left for such purpose, under the recorded ordinance, a certificate stating in what newspaper and of what dates such publication was made, and sign his name thereto officially, and such certificate shall be *prima facie* evidence that legal publication of such ordinance has been made.<sup>1</sup> [66 v. 166, § 101.]

(1) **Prima facie evidence.**— those denying publication. O'Brien Clerk's certificate is sufficient proof v. Cleveland, 1 Clev. 100. of publication to put the burden on

#### FORM OF CERTIFICATE OF PUBLICATION.

I, ....., clerk of the city [or village] of ....., State of Ohio, do hereby certify that the foregoing ordinance was duly published in.....and....., two newspapers of opposite politics, published and of general circulation in said city [or village] and in....., a newspaper printed in the German language and having a *bona fide* paid circulation within said municipality of not less than one thousand copies, as shown by the affidavit of the proprietor or editor of said German newspaper, filed with me. Said publications were on the following dates: (here insert dates of publication in each newspaper.)

.....19.....

.....  
Clerk of the city [or village] of.....

NOTE.—By § 196 of the Code the requirements of §§ 119 to 124 of the Code, inclusive, are made to apply to villages.

#### FORM OF AFFIDAVIT OF CIRCULATION OF GERMAN NEWSPAPER.

State of Ohio,  
..... County, } ss.

....., being duly sworn, says that he is the proprietor [or editor] of....., a newspaper printed in the German language in the city [or village] of....., State of Ohio; and that said newspaper has a *bona fide* paid circulation within said municipality of not less than one thousand copies.

.....  
Subscribed and sworn to before me this.....day of  
....., 19.....

[Seal.]

.....  
Notary Public.....County, O.

**Sec. 1697 R. S. [Mode of publication.]** In all municipal corporations in which there is no newspaper published it shall be sufficient publication of ordinances, resolutions, statements, orders, proclamations, notices and reports required by "An act to provide for the organization of cities and incorporated villages," passed October 22, 1902, (96 O. L. extraordinary session, 1902) which require publication, to post up copies of such ordinance, resolution, statement, order, proclamation, notice or report at not less than five of the most public places in the corporation, to be determined by the council, for a period





of not less than fifteen days prior to the taking effect thereof, except advertising for bids for the construction of public improvements, which shall be published in at least one newspaper of general circulation in the corporation for not less than two nor more than four consecutive weeks, and notices of the sale of bonds which notices shall be published in such manner and for such time as is provided for in section 97 of "An act to provide for the organization of cities [and] incorporated villages," passed October 22, 1902 (96 O. L. extraordinary session, 1902).

The clerk shall make a certificate of such posting and the times, [when], and places where done, in the manner provided in the preceding section; and such certificate shall be *prima facie* evidence that the copies were posted up as required. [66 v. 166; 97 v. 447.]

#### FORM OF CERTIFICATE OF POSTING.

I, ....., clerk of the city [or village] of ..... State of Ohio, do hereby certify that there is no newspaper published in said municipality, and that publication of the foregoing ordinance was duly made by posting true copies thereof at five of the most public places in said corporation as determined by the council, as follows: (here state places of posting) each for the period of fifteen days, commencing on the ..... day of ....., 19....  
..... 19,....

.....  
Clerk of the city [or village] of .....

**Sec. 1698 R. S. [Effect of non-publication.]** It shall be deemed a sufficient defense to any suit or prosecution under an ordinance, to show that no such publication or posting as herein required was made.<sup>1</sup> [66 v. 166, § 103; (S. & C. 1525).]

(1) **Premature action under** tion of its publication is void.  
**ordinance.**—Any action taken under Hensly v. Hamilton, 3 C. C. 201.  
der an ordinance before the comple-

**Sec. 1699 R. S. [By-laws, ordinances, etc., as evidence.]** The printed copies of the by-laws or ordinances of a corporation, published under its authority, and transcripts of any by-laws, resolutions, or ordinances, or of any act or proceeding of a municipal corporation, recorded in any book, or entered on any minutes or journal, kept under the direction of such corpora-

tion, and certified by its clerk, shall be received in evidence, through the state, for any purpose for which the original books, ordinances, minutes, or journals would be received.<sup>1</sup> [66 v. 166, § 104.]

(1) **Proof of ordinance** by certified transcript made by clerk is not erroneous. *Ry. Co. v. Ry. Co.*, 12 C. C. 367.

**Judicial notice of ordinances.**—Municipal courts will take judicial notice of municipal ordinances, in prosecutions under such ordinances; and a reviewing court occupies same position as municipal court. *Strauss v. Conneaut*, 3 C. C. (N. S.) 445; 23 C. C. 320; *Keck v.*

*Cincinnati*, 3 N. P. 253; *Akerman v. Lima*, 7 N. P. 92. State courts will not take judicial notice of municipal ordinances in the absence of a statute requiring it. *Toledo v. Libbie*, 19 C. C. 704 (affirmed without report, 51 O. S. 562); *Chittenden v. Columbus*, 26 C. C. 531; 5 C. C. (N. S.) 84. See also *Esch v. Elyria*, 27 C. C. 446; 7 C. C. (N. S.) 9.

**Sec. 124a. [Codification of ordinances, etc.; publication in book form sufficient.]** Whenever ordinances which have been passed and published shall be revised, codified, rearranged and published in book form and certified as correct by the city or village clerk and the mayor thereof, such publication in book form shall be taken and held to be in lieu of publishing the same as required by section 124 and shall be a sufficient publication to all intents and purposes, but any and all ordinances passed subsequent to such revision and codification shall be subject to all the provisions of section 124 requiring publication in a newspaper or newspapers. Such revision and codification may be made under appropriate titles, chapters and sections and in one ordinance containing one or more subjects.<sup>1</sup> [1904, April 25, 97 v. 321.]

(1) See § 1695 R. S., p. 320.

**Sec. 125. [Mayor's veto.]**<sup>1</sup> Every ordinance or resolution of council shall, before it goes into effect, be presented to the mayor for approval. The mayor, if he approve the same shall

sign it, and return it forthwith to council; but if he do not approve it, he shall, within ten days after its passage or adoption, return the same with his objections to council, or, if council is not in session, return it to the next regular meeting thereof, which objections council shall cause to be entered upon its journal; provided, that the mayor may approve or disapprove the whole or any item, of an ordinance appropriating money. If he do not return such ordinance or resolution within the time limited in this section, it shall take effect in the same manner as if he had signed it, unless council by adjournment prevent its return. When the mayor disapproves an ordinance or resolution, or any part thereof, and returns it to council with his objections, council may, after ten days, reconsider the same, and if such ordinance, resolution or item, upon such reconsideration is approved by the votes of two-thirds of all the members elected to council, it shall then take effect as if signed by the mayor.<sup>2</sup>

[**Authentication of ordinances and resolutions.**] Ordinances and resolutions shall be authenticated by the signature of the presiding officer and the clerk of council.

[**Style of ordinances.**] The style of all ordinances shall be, "Be it ordained by the council of the city of ———, state of Ohio," (filling the blank with the name of the city).

(1) **Old sections.**—Compare old §§ 1666, 1667 and 1668 R. S., repealed; and §§ 1655a (1666-1) and (1666-2) R. S., repealed.

(2) **Veto of part** of an ordinance by the mayor is valid. He may veto part and leave the rest good. *Sanfleet v. Toledo*, 10 C. C. 460.

**Effect of failure to present to mayor** under former laws, see Wal-

cutt v. Columbus, 26 C. C. 238; 6 C. C. (N. S.) 271.

**Signature** of mayor, "per clerk," on copy sent to council is valid. *State ex rel. v. Henderson*, 8 B. 201 (reversed on other grounds, 38 O. S. 644).

**No veto power in villages.**—See § 196 of the Code.

**Sec. 126. [Salaries of municipal officers, clerks and employees.]**<sup>1</sup> Council shall fix the salaries of all officers, clerks and employes in the city government,<sup>2</sup> except as otherwise provided in this act,<sup>3</sup>



and, except as otherwise provided in this act, all fees pertain-ing to any office shall be paid into the city treasury.<sup>4</sup> The salary of any officer, clerk or employe so fixed, shall not be increased or diminished during the term for which he may have been elected or appointed;<sup>5</sup> provided, that the compensation of members of council, if any is fixed, shall be in accordance with the time actually consumed in the discharge of their official duties, but in no event shall exceed one hundred and fifty dollars per year, each, in cities having a population according to the last or any succeeding federal census, of 25,000, or less, and for every 30,000 additional inhabitants determined as aforesaid, said compensation may be, but shall not exceed, an additional one hundred dollars per year each, but the salary shall in no city be greater than twelve hundred dollars per annum; and provided further, that the salaries of members of council shall be paid semi-monthly and a proportionate reduction in said salaries shall be made for the non-attendance of any member upon any regular or special meeting thereof.

(1) **Old sections.**—Compare old §§ 1683, 1683a, 1655a, 1716 and 1717 R. S. (repealed).

(2) **Salaries** fixed by council. See § 227 of the Code and notes.

**Form of ordinance** fixing salaries and bonds of officers, clerks and employes, and organizing various departments of the city government, see that given under § 227 of the Code.

(3) **Exceptions.**—As to board of public service, see § 145 of the Code; board of health, § 189 and sections of R. S. therein re-enacted; university directors, § 217; library trustees, § 218.

(4) **Fees of mayor** must be paid into city treasury except as otherwise provided. This refers to municipal fees only. In state cases the mayor is allowed by § 1745 R. S. the same fees as justices of the peace, and such fees are not turned into city treasury. *Piqua v. Cron*, 14 Dec. 500; 2 N. P. (N. S.) 165; *Portsmouth v. Milstead*, 28 C. C. 384;

8 C. C. (N. S.) 114. See § 1745 R. S., p. 543.

But § 1751 R. S., providing that all moneys received by the mayor, *except the fees of his office*, shall be paid into the city treasury, does not form an exception to provisions of code § 126, as § 1751 applies only to village mayors. *Bellefontaine v. Haviland*, 3 N. P. (N. S.) 99; 15 Dec. 482; *Cambridge v. Smallwood*, 27 C. C. 302; 6 C. C. (N. S.) 230.

Upon the failure of the mayor to pay fees collected into city treasury he may be compelled to do so in an action brought for that purpose by the city. *Cambridge v. Smallwood*, 27 C. C. 302; 6 C. C. (N. S.) 230.

(5) **Increase or reduction during term.**—Former § 1717 R. S. (repealed) on this subject, was held to relate only to officers of a municipal corporation proper. *State ex rel. v. Bd. Ed.*, 21 C. C. 785.

It did not apply to board of examiners for schools. *Ib.*

Compare Constitutional provision (Art. II., § 20 of Constitution). Under this provision it was held that if the effect of a statute, whatever its terms, was to increase an officer's salary during his term, it was void. *State ex rel. v. Raine*, 49 O. S. 580. The Constitutional provision was held not to forbid legislation reducing fees or percentages; salary was held to mean periodical payment. *Thompson, Relator, v. Phillips*, 12 O. S. 617; so increase in *per diem* compensation was held not an increase in salary. *Gobrecht v. Cincinnati*, 51 O. S. 68.

The Constitutional rule was held not to apply to an officer holding over until his successor is elected and qualified. *Woehler v. Toledo*, 6 B. 282; nor to a law reducing compensation of officer after election, but before his term began. *State ex rel. v. Capeller*, 3 B. 853. The Constitutional provision does not refer to municipal officers. *State ex rel. v. Bd. of Ed.*, 21 C. C. 785.

See, further, as to application of such a prohibition, *State ex rel. v. Carlisle*, 16 Dec. 263; 3 N. P. (N. S.) 544.

**Sec. 127. [Certain acts not repealed.]** All acts or parts of acts which apply to all cities in the state, which are not inconsistent herewith, and confer powers or impose duties upon the councils of cities, and all those which limit or restrict such councils shall be and remain in full force and effect; and all powers conferred by this act upon municipal corporations shall be exercised by council, unless otherwise provided herein.<sup>1</sup>

(1) **Other statutes** relating to powers and duties of council, not expressly re-enacted by the Code. and

not expressly repealed by it may be found in Part II hereof.

## 2. EXECUTIVE.

**Sec. 128. [Executive power vested in whom.]**<sup>1</sup> The executive power and authority of cities shall be vested in a mayor, president of council, auditor, treasurer, solicitor, department of public service, department of public safety and such other officers<sup>2</sup> and departments as are created by this act.

(1) **Old sections.**— Compare old, §§ 1707, 1707*b*, 1707*d*, 1707*e*, 1707*f*, 1708*a*, (1545-12), (1545-99), (1545-268), and (1545-289) R. S. repealed, prescribing the officers in various cities.

(2) **Combining offices.**— The new Code does not forbid the duties of two offices being performed by one person where such duties are not inconsistent. For example the city auditor may be elected clerk of council.

**Office and officer defined.**— To constitute a public office "it is essential that certain independent public duties, a part of the sovereignty of the State, should be appointed to it by law to be exercised by the incumbent, in virtue of his election or appointment to the office, thus created and defined, and not as a mere employe, subject to the direction and control of some one else." State *ex rel.* v. Jennings, 57 O. S. 415. See also State *ex rel.* v. McGonagle, 26 C. C. 685; 5 C. C. (N. S.) 292.

Emoluments and method of choice are not the tests of what is an office. State *ex rel.* v. Anderson, 45 O. S. 196; State *ex rel.* v. Kennon, 7 O. S. 546.

See further for discussion of definition of office and officer, Shaw v. Jones, 4 N. P. 372; State *ex rel.* v. Hamilton Co., 5 C. C. 602; State *ex rel.* v. Wilson, 29 O. S. 347; Walker v. Cincinnati, 21 O. S. 14; State *ex rel.* v. Rust, 4 C. C. 329; Wood Co.

v. Pargillis, 10 C. C. 376; State v. Anderson, 57 O. S. 429; Barker v. State, 69 O. S. 68; State *ex rel.* v. Coon, 26 C. C. 241; 4 C. C. (N. S.) 560.

A deputy is not an officer. Warwick v. State, 25 O. S. 21; State v. Meyers, 56 O. S. 340.

See also as to officers, notes to § 227 of the Code and § 1737 R. S. re-enacted in § 224 of the Code.

**Discretion of legislature.**— Whether an officer shall be elected or appointed is a matter within the discretion of the legislature, and this discretion cannot be interfered with by the courts. State *ex rel.* v. Covington, 29 O. S. 102.

**Abolishment of office.**— An office created by ordinance is abolished by the repeal of the ordinance and the incumbent thereby ceases to be an officer. State *ex rel.* v. Jennings, 57 O. S. 415.

**Creation of office.**— An act authorizing council to establish a board and fill it, creates the office, though until the council acts, it is a mere potentiality. Smith v. Lynch, 29 O. S. 261.

**New boards as successors.**— New boards having the same functions as old boards, are to be regarded as their successors, and powers given to the old boards and their successors may be exercised by the new. Hafer v. Cincinnati, 28 B. 131; Kirker v. Cincinnati, 48 O. S. 507.



**Delegating power.** — Officers cannot delegate discretionary power.

Kelley v. Cincinnati, 7 N. P. 360; Moore v. Cassily, 16 C. C. 708; Bd. of Ed. v. Mills, 38 O. S. 383; Snelbaker v. Jacob, 5 B. 73; Lippleman v. Cincinnati, 4 C. C. 327. See further Ampt v. Cincinnati, 17 C. C. 516 (affirmed 60 O. S. 621).

**Municipal liability for officers' acts.**—In the exercise of a public or governmental function, a municipality cannot be held liable for the torts of its officers or servants, but where it is acting in its corporate capacity, as where it is making improvements of corporate property, the liability of the municipality will be governed by the same rules as in the case of an individual. Bloom v. Newark, 16 Dec. 393; 3 N. P. (N. S.) 480.

Municipality is liable for the negligence of its officers in managing public improvements. Dayton v. Pease, 4 O. S. 80; Toledo v. Cone, 41 O. S. 149; Johns v. Cincinnati, 45 O. S. 278.

Municipality is liable for tort of park custodian, acting within scope of employment. Bloom v. Newark, 16 Dec. 393; 3 N. P. (N. S.) 480.

Municipality may be bound by its properly constituted authorities whenever they have power to act in the premises. Cincinnati v. Morgan, 4 O. F. D. 50.

But the municipality is not liable for the acts of officers, not done in their official capacity, but for and between individuals. Dayton v. Pease, 4 O. S. 80; Bellaire Co. v. Findlay, 5 C. C. 418.

**De facto officers.**—Definition

and validity of acts, see notes, p. 503.

**Admissions of officers,** as to dangerous character of work being done, not a part of the *res gestae*, are not admissible to prove notice of character of work on the part of the municipality. Circleville v. Throne, 1 C. C. 359.

**Estoppel** does not arise from acts of officers, where there is a want of power to act. Bd. of Ed. v. Sinton, 41 O. S. 504; Neil v. Barron, 7 N. P. 84.

But where officers have authority municipality may be estopped by their acts and admissions, especially if municipality is acting in its proprietary capacity. Thomas v. Railway Co. 10 O. F. D. 544.

**Suits against officers in their official capacity.**—See Karb v. State, 54 O. S. 383; Board of Health v. Columbus, 12 Dec. 553.

**Officers' personal liability.**—Officers of municipality are not personally liable, while acting within the scope of their authority and in good faith. Stewart v. Southard, 17 O. 402; Scovil v. Geddings, 7 O. (Part II) 211; Thomas v. Wilton, 40 O. S. 516; Rose v. Toledo, 24 C. C. 540; 1 C. C. (N. S.) 321.

An officer is personally liable for a publication which is libelous *per se* though issued under performance of a public duty, if, in fact, the statement published was not pertinent and material to the matter in hand. Mauk v. Brundage, 68 O. S. 89, 97.

Where some members of a board in such case were actuated by malice and some were not, it is

proper practice to render a verdict against all of the defendants for compensatory damages and exemplary damages against those found to have been guilty of malice. *Ib.*

Criminal liability of officer for embezzlement not removed because

ordinance under which he received the funds was invalid. *State v. Carter*, 67 O. S. 422.

Liability for acts of subordinates, see *Meara v. Holbrook*, 20 O. S. 137, 143.

### (A) CHIEF OFFICERS.

#### *Mayor.*

#### **Sec. 129. [Mayor: Election, term, qualifications, duties, etc.]**<sup>1</sup>

The mayor shall be elected for a term of two years, and shall serve until his successor is elected and qualified. He shall be an elector of the corporation. The mayor shall be the chief conservator of the peace within the corporation<sup>2</sup> and shall have such other powers and perform such other duties as are conferred and required in sections 1746, 1747, and 1748 of the Revised Statutes of Ohio; such as are provided in this act, and all other acts or parts of acts applying to all cities of the state and not inconsistent herewith.<sup>3</sup>

**[Appointment, removal and suspension of officers, clerks and employees.]** The directors and officers provided in this act shall have the exclusive right, subject to the limitations herein prescribed to appoint all officers, clerks and employees in their several respective departments or offices, and shall likewise, subject to the limitations herein prescribed, have sole power to remove or suspend any such officers, clerks or employees.<sup>4</sup> [1904, April 7, 97 v. 78.]

(1) **Old sections** 1744 R. S., under OFFICERS in Part II; § 1754 R. S., repealed.

(2) **Mayor obstructing process against city.**—Mayor may be punished for contempt of court if he forcibly interferes with levy of execution against city property. *State ex rel. v. Holden*, 12 Dec. 91.

Whether mayor is so far the representative of the city that he can question regularity of judgments against it, *quere. Ib.*

(3) **Other statutes** on powers and duties of mayor not expressly re-enacted and not repealed by the Code may be found in Part II (§§ 1744, 1745 and 1752 R. S.); §§

1750 and 1751 are re-enacted in Code § 200, relating to mayor in villages.

(4) **Organizing departments.**—As to determining what officers there shall be and their salaries and bonds, see § 227 of the Code, page 512.

**Filling vacancies.**—As to matters relating to filling of vacancies, see § 228 of the Code.

**Salary and fees,** see § 126 and notes.

**Sec. 1746 R. S. [Further duties.]** He shall perform all the duties prescribed by the by-laws and ordinances of the corporation; and it shall be his special duty to see that all ordinances, by-laws, and resolutions of the council are faithfully obeyed and enforced; <sup>1</sup> and he shall sign all commissions, licenses, and permits granted by authority of the council, or authorized by this title, <sup>2</sup> and such other instruments as by law or ordinance may require his certificate. <sup>3</sup> [66 v. 169, § 116; (S. & C. 1510, 1511).]

(1) **Provision mandatory.**—*Wheeler v. Gavin* 5 C. C. 246, 250.

The mayor cannot refuse to enforce ordinances because he may think them invalid, until the question is presented to him in a proper manner. *Ib.*

**Personal liability.**—Mayor is not liable personally for issuing a warrant for violation of an ordinance, because the ordinance is af-

terward declared invalid. *Wheeler v. Gavin*, 5 C. C. 246.

(2) **Title referred to.**—The reference here is to Title XII R. S., of which this section formed a part. The new Code is, by § 212, made a part of Title XII.

(3) **Corporation deeds** to be signed by mayor. *Tiffin v. Shawhan*, 43 O. S. 178, 186.

**Sec. 1747 R. S. [Supervision of conduct of officers.]** He shall supervise the conduct of all the officers of the corporation, inquire into and examine the grounds of all reasonable complaints against any of them, and cause all their violations or neglect of duty to be promptly punished or reported to the proper authority for correction. <sup>1</sup> [66 v. 169; § 119.]

(1) **Corresponding provisions** will be found in §§ 38 and 225 of the Code. In the former the mayor is given authority to appoint examiners to investigate any department of the city government; in the latter he is empowered to pre-

fer charges against any municipal officer believed by him to be guilty of misfeasance or non-feasance in office. See further as to general supervisory powers of the mayor, §§ 37 and 130 of the Code.

**Sec. 1748 R. S. [Mayor to record his protest against excess of expenditure.]** If, in the opinion of the mayor, an expenditure is authorized by the council exceeding the revenues of the cor-



poration for the current year, it shall be his duty to protest against such expenditure, and enter such protest, and the reason therefor, on the journal of the council.<sup>1</sup> [66 v. 261, § 657.]

(1) **Supervision of mayor over expenditures.**—See §§ 35, 36, 37, 38 and 125 of the Code.

**Sec. 130. [Directors of several departments of city to meet with mayor for consultation and advice.]**<sup>1</sup> Whenever the mayor shall deem necessary, the directors of the several departments of the city shall meet with him at the time and place designated by said mayor, for consultation and advice upon the affairs of the city.

(1) **Old sections.**—Compare old § (1545-121) R. S. (Columbus), repealed. § (1545-34) R. S. (Cleveland), and

**Sec. 131. [Mayor, directors and officers to attend meetings of council upon request.]**<sup>1</sup> It shall be the duty of the mayor, the directors and of the several officers provided for in this act, to attend the meetings of council when specifically requested by council so to do, and to answer at such time such questions relative to the affairs of the city, under their respective management and control, as may be put to any of them by any member of the council.

(1) **Old sections.**—Compare old § (1545-115) R. S. (Columbus), repealed. § (1545-27) R. S. (Cleveland), and

*President of Council.*

**Sec. 132. [President of council: Election, term, qualification, duties, etc.; when shall be acting mayor; vacancy in office of mayor.]** The president of council shall be elected for a term of two years, and shall serve until his successor is elected and qualified.<sup>1</sup> He shall be an elector of the corporation, and shall

preside at all regular and special meetings of council, but shall have no vote therein except in case of a tie.<sup>2</sup> When the mayor is absent from the city, or is unable for any cause to perform his duties, the president of council shall be the acting mayor. In case of the death, resignation or removal of the mayor, the president of council shall become the mayor, and serve for the unexpired term, and until the successor is elected and qualified; and the president *pro tem.* of council shall thereupon become president thereof, and shall have the same rights, duties and powers as his predecessor, and the vacancy thus created in council shall be filled as other vacancies, and council shall elect another president *pro tem.* Provided, further, that while the president of the city council is acting as mayor he shall not serve as president of council.

(1) See note (3) under § 116 of the Code.

be considered a member of council in determining the presence of a quorum.

(2) **Not a member in constituting quorum.**—The president of council under the new Code is not to

### *Auditor.*

**Sec. 133. [Auditor; election, term, qualification, duties, etc.]**<sup>1</sup> The auditor shall be elected for a term of two years, and shall serve until his successor is elected and qualified. He shall be an elector of the corporation. The auditor shall keep the books of the city, exhibit accurate statements of all moneys received and expended, and of all property owned by the city and the income derived therefrom, and of all taxes and assessments. At the end of each fiscal year, or oftener if required by council, he shall examine and audit the accounts of all officers and departments, and shall prescribe the form of accounts and reports to be rendered to his department, and the form and method of keeping accounts by all other departments, and shall have the inspection and revision thereof; but

nothing herein contained shall be construed to repeal or impair the effect of an act entitled "An act to create a bureau of inspection and supervision of public offices, and to establish a uniform system of public accounting, auditing and reporting under the administration of the auditor of state," passed May 10, 1902.<sup>2</sup> Upon the death, resignation, removal or expiration of the term of any officer, the auditor shall audit the accounts of such officer, and if such officer be found indebted to the city, he shall immediately give notice thereof to council and to the solicitor, and the latter shall proceed forthwith to collect the same. He shall not allow the amount set aside for any appropriation to be overdrawn, or the amount appropriated for one item of expense to be drawn upon for any other purpose, or unless sufficient funds shall actually be in the treasury to the credit of the fund upon which such voucher is drawn. Whenever any claim is presented to him, he shall have power to require evidence that such amount is due, and for this purpose may summon any agent, clerk or employe of the city, or any other person, and examine him upon oath or affirmation concerning such voucher or claim. [1906, April 16, 98 v. 196.]

(1) **Old section.**— Compare old § 1765a R. S., repealed.

(2) **Uniform accounting law.**— The act of May 10, 1902, creating a bureau of inspection and super-

vision of all public offices, and establishing a uniform system of public auditing and accounting, as amended April 23, 1904, will be found under OFFICERS in Part II.

**Sec. 134.** [Further as to powers and duties of auditor; seal.] <sup>1</sup>

Detailed statements of the receipts and expenditures of the several officers and departments for the preceding month shall be made to the auditor by the heads thereof on the first Monday of each month. The auditor shall countersign each receipt given by the treasurer before it shall be delivered to the person entitled to receive the same, and shall charge the treasurer with the amount thereof; and if the auditor shall approve any vouch-



er contrary to the provisions of this act, he and his sureties shall be individually liable for the amount of the same. The auditor shall have the powers and perform the duties conferred and required in sections 1756, 1757, 1758, 1759 and 1761, of the Revised Statutes of Ohio, and such other powers and duties as may now or hereafter be conferred or required by ordinance or by any law applying to all cities of the state.<sup>2</sup> Council shall provide a seal for the auditor, in the center of which shall be the name of the city, and around the margin the words "City Auditor," an impression of which seal shall be affixed to all transcripts, orders, certificates or other papers requiring authentication.

- (1) **Old sections.**—Compare old      ments by auditor to be furnished to  
 §§ 1764 and 1765 R. S., repealed.      mayor; see §§ 36 and 44 of the  
 (2) **Other provisions.** — State-      Code.

**Sec. 1756 R. S.** [Auditor to make detailed statement of receipts and expenditures.] He shall, on or before the third Monday in March of each year, make and enter in the record book of the corporation, a detailed statement of all the receipts and expenditures, the number and amount of bonds issued, and for what purpose of the corporation for the preceding year, stating from what sources the money was received, and to whom paid, and for what purposes expended and showing the exact condition of the several funds of the corporation, and all outstanding liabilities, if any, to whom due, and for what purpose.<sup>1</sup> [1883, March 21: 80 v. 65; Rev. Stat. 1880; 67 v. 71, § 129.]

- (1) **Further duties of similar character.**—See §§ 36 and 133 of the Code.

**Sec. 1757 R. S.** [Statement to be posted at voting precincts, or published in newspaper; penalty for neglecting; publication in book form sufficient.] He shall cause a copy of said detailed statement, which shall be approved by the mayor to be posted at the places of holding elections for officers of the corporation, on the first Monday of April, annually; any incorporation having a population of over two thousand (2,000), the clerk shall have same published once in some newspaper published or of

general circulation in the corporation, at least five days prior to the first Monday of April; and, upon the order of the council, the clerk shall, at any time, furnish to it a detailed statement of all receipts and disbursements, for such periods as it may require. Any clerk refusing or neglecting to conform to the provisions of this and the next preceding section, shall be fined by the mayor, or police court as the case may be, not more than thirty dollars or less than twenty-five dollars for the use of the corporation. The provisions of sections *one thousand seven hundred and fifty-six*, and *one thousand seven hundred and fifty-seven* shall not apply to any municipal corporation that publishes annually a detailed statement of the receipts and expenditures in book form or in any other printed manner. [1883, March 21: 80 v. 65; Rev. Stat. 1880; 67 v. 71, § 130.]

**Sec. 1758 R. S. Report to auditor of state, etc.]** He shall, on or before the first Monday of June, in each year, report to the auditor of state the aggregate expenses of the corporation for the preceding year, under the following heads: school, police, streets, bridges, fire department, lights, poor, salaries, and interest; and also the amount of the general corporation tax for all the preceding objects, and for any others not enumerated, and the special taxes levied and collected by the corporation for the same period<sup>1</sup>: provided, that the city auditor, in any city having such officer, shall perform the duties imposed upon the clerk by this and the two preceding sections. [67 v. 71, § 131; (S. & C. 1543).]

(1) **Reports to state auditor.**— Under the act of May 10, 1902, made to remain in force by § 133 of the Code, a bureau of inspection and supervision of all public offices is created, and a uniform system of public auditing and accounting is established. The reports of city auditors to the auditor of state

are required to be made in conformity with said act, and blanks for this purpose are prepared in the office of the state auditor, who is made the head of the bureau. The new "uniform accounting law" will be found under OFFICERS in Part II.

**Sec. 1759 R. S. [Shall certify to the court election of certain officers.]** He shall certify to the court of common pleas of the county in which the corporation is situated, the election of every officer of the corporation having power to discharge the duties of a justice of the peace, or to take the acknowledgment of deeds, or to certify depositions or affidavits to be used within the limits of such corporation, with the date of such election, and the time when such officer became legally qualified to dis-

charge the duties of such office; which certificate shall be made within ten days after such qualification. [66 v. 171, § 132; (S. & C. 1536).]

#### FORM OF CERTIFICATE.

To the Clerk of the Court of Common Pleas, .....County, Ohio:

I, ....., auditor of the city of....., State of Ohio, hereby certify that on the.....day of....., 19...., ..... was duly elected..... (here insert title of office) and qualified for said office on the..... day of ....., 19....

IN WITNESS WHEREOF, I have hereunto set my hand and official seal this.....day of....., 19....

[Seal.]

.....  
Auditor of the city of.....

**Sec. 1761 R. S. [Penalty for neglect.]** Every clerk<sup>1</sup> whose duty it shall be to make such certificate, or record the same when presented for record,<sup>2</sup> who neglects or refuses to perform the duties enjoined by this chapter,<sup>3</sup> shall pay to the treasurer of the corporation, for every such neglect or refusal, the sum of fifteen dollars, to be recovered in a civil action, at the suit of such corporation; and shall also be liable for all damages arising from such neglect or refusal; and any corporation clerk who neglects to make report as provided in section *seventeen hundred and fifty-eight* shall forfeit one hundred dollars, to be recovered in a civil action, with costs, in the name of the corporation, and for its use. [66 v. 172, § 134; 67 v. 71, § 131; (S. & C. 1536).]

(1) This refers to city auditor and county clerk. See § 1760 R. S., under OFFICERS in Part II.

(2) See § 1760 R. S., in Part II, *infra*, which requires the clerk of the Court of Common Pleas to re-

cord the certificate given under § 1759 R. S., *supra*.

(3) This section was part of Chapter 5, Div. 4, Title XII, R. S. Chapter 5 related to the powers and duties of city and village officers.

#### *Treasurer.*

**Sec. 135. [Treasurer: Election, term, qualification, powers and duties.]** The treasurer shall be elected for a term of two years, and shall serve until his successor is elected and qualified. He shall be an elector of the corporation. The powers and duties of the treasurer shall be such as are provided in sections 1767, 1768 and 1769, of the Revised Statutes of Ohio; such as are provided in this act, and all other acts or parts of acts applying to all cities of the state and not inconsistent with this act.<sup>1</sup>



[**Deposit of moneys.**]<sup>2</sup> The treasurer, upon giving bond as required by the council, may, by and with the consent of his bondsmen, deposit all funds and public moneys of which he has charge in such bank or banks, situated within the county, which may seem best for the protection of said funds, which said deposit shall be subject at all times to the warrants and orders of the treasurer required by law to be drawn<sup>3</sup> and all profits arising from said deposit or deposits shall inure to the benefit of said funds,<sup>4</sup> provided that such deposit shall in no wise release the treasurer from liability for any loss which may occur thereby.

The council shall have authority to provide by ordinance for the deposit of all public moneys coming into the hands of the treasurer, in such bank or banks, situated within the county, as may offer, at competitive bidding, the highest rate of interest and give a good and sufficient bond issued by a surety company authorized to do business in Ohio, or furnish good and sufficient surety, in a sum not less than twenty per cent in excess of the maximum amount at any time to be deposited; provided, that there shall not be deposited in any one bank an amount in excess of the paid in capital stock and surplus of such bank, and not in any event to exceed one million (1,000,000.00) dollars and to determine in such ordinance the method by which said bids shall be received, the authority which shall receive them, and which shall determine the sufficiency of the security offered, the time for the contracts for which deposits of public money may be made, and all details for carrying into effect the authority here given, provided that all such proceedings in connection with such competitive bidding and the deposit of money shall be conducted in such manner as to insure full publicity, and shall be open at all times to the inspection of any citizen; and provided further, that as to any deposits made under authority of an ordinance of the council,

pursuant hereof, neither the treasurer nor his bondsmen, if the treasurer has exercised due care, shall be liable for any loss occasioned thereby.<sup>5</sup> [1904, April 23, 97 v. 270.]

(1) **Other statute** applying to powers and duties of treasurer not repealed and not re-enacted by the Code may be found under OFFICERS in Part II (§ 1773 R. S.).

Payments by county treasurer to city treasurer of moneys belonging to municipality, see §§ 1047, 1122, 1122a, 1123 and 1771 R. S., under title OFFICERS in Part II.

(2) **Old section.**—Compare old § (1773-1) R. S., repealed.

(3) **Mandamus** will lie to compel a treasurer to pay on order properly drawn on him, and if he refuses wilfully and oppressively, he is liable to a personal action. *Bates v. Fries*, 2 Disney, 511.

(4) **Interest on public funds.**—The requirement that all profits derived from the deposit of public funds shall inure to the benefit of such funds, and this, even though the treasurer is liable for any loss occasioned by such deposit, is a

legislative declaration of the principle announced in *Eshelby v. Board of Education*, 66 O. S. 71.

(5) **Forms of ordinances** providing for the establishment of such depositaries of public moneys, may be drafted from the various depositary acts in the Revised Statutes. See, for example, §§ (1136-14) *et seq.* (County of Cuyahoga); (1784-1) *et seq.* (Cleveland); (1784-21) *et seq.* (Toledo); (1784-41) *et seq.* (Tiffin).

**Validity of provision** that council may provide for deposit of money by treasurer, upheld. *State ex rel. v. Bowers*, 26 C. C. 326, (aff'd 70 O. S. 423).

**Duty of treasurer.**—Treasurer has no discretion to refuse to obey ordinance, and mandamus will lie to compel obedience. *Ib.*

**Applies to school funds.**—This section applies to school funds. *Ib.*

**Sec. 1767 R. S.** [Powers and duties of treasurer.] The treasurer shall keep an accurate account of all moneys by him received, showing the amount thereof, the time when, from whom, and on what account received; also of all disbursements by him made, showing the amount thereof, the time when, to whom, and on what account paid; and he shall so arrange his books that the amount received and paid on account of separate funds, or specific appropriations, shall be exhibited in separate accounts; and in addition to the ordinary duties of such officer, he shall have such powers and perform such duties as are prescribed in this title,<sup>1</sup> or as may be required by ordinance of the corporation not inconsistent with this title, and not incompatible with the nature of his office. [66 v. 174, § 151.]

(1) **Title referred to.**—This section was part of Title XII R. S. The Code is, by § 212, made a part of Title XII.

**Sec. 1763 R. S.** [Further duties of treasurer.] He shall demand and receive from the county treasurer all taxes levied and assessments made and certified to the county auditor by authority of the council, and by the auditor placed on the tax-list for collection, and from all persons authorized to collect or required to pay the same;<sup>1</sup> all moneys accruing to the corporation from judgments, fines, penalties, forfeitures, licenses, and costs taxed in the mayor's and police courts, and debts due the

corporation; and he shall disburse the same on the order of such person or person[s] as may be authorized by law or ordinance to issue orders therefor. [66 v. 174, § 152.]

(1) **Taxes paid under protest.** — City treasurer may compel county treasurer to pay over moneys collected and belonging to the city, although paid under protest. *Ratterman v. State*, 44 O. S. 641.

**Sec. 1769 R. S. [Quarterly account.]** He shall settle and account with the council quarterly, and also whenever the council may by resolution or ordinance require; and he shall report annually to the council, at the first regular meeting thereof in April, the condition of the finances of the corporation and the amount received by him, and the sources whence received, and the disbursements by him made, and on what account, during the year preceding the first day of April; and such account shall exhibit the balance due on each fund which may have come into his hands during the year. [66 v. 174, § 153.]

**Sec. 136. [Further duties of treasurer.]** The treasurer shall receive and disburse all funds of the city including the school funds,<sup>1</sup> and such other funds as arise in or belong to any department or part of the city government.

(1) **As treasurer of school funds.**—By § 4042 R. S. "in each city district the treasurer of the city funds shall be treasurer of the school funds."

As to compensation and liability of treasurer when acting as treasurer of school funds, see *Knorr v. Bd. of Ed.*, 9 B. 182; *Eshelby v. Bd. of Ed.*, 66 O. S. 71. As to additional bond before acting as treasurer of school fund, see *Knorr v. Bd. of Ed.*, *supra*; *Eshelby v. Bd. of Ed.*, *supra*.

### *Solicitor.*

**Sec. 137. [Solicitor: Election, term and qualifications.]** The solicitor shall be elected for a term of two years, and shall serve until his successor is elected and qualified. The solicitor shall be an elector of the city, and admitted to practice law in the courts of Ohio.

**[Powers and duties.]** The powers and duties of the solicitor shall be such as are provided in sections 1776, 1777, 1778, 1779 and 1780, of the Revised Statutes of Ohio; such as are



provided in this act, and all other acts or parts of acts having uniform operation throughout the state and not inconsistent with this act,<sup>1</sup> and he shall prepare all contracts, bonds and other instruments in writing in which the city is concerned, and shall serve the several directors and officers mentioned in this act as legal counsel and attorney; provided that no action, as provided in sections 1777 and 1778, to enjoin the performance of a contract or the payment of any bonds heretofore or hereafter entered into or issued by a municipal corporation, shall be brought or maintained unless such action is commenced within one year from the date of such contract or bonds, and this provision shall apply to pending cases.<sup>2</sup>

[**Shall be prosecuting attorney of police court.**] The solicitor shall also be prosecuting attorney of the police court, and shall receive for this service such compensation as council may prescribe, and such additional compensation as the county commissioners shall allow; provided, that where council allows an assistant or assistants to the solicitor, said solicitor may designate an assistant or assistants to act as prosecuting attorney or attorneys of the police court. The duties of the solicitor as prosecuting attorney of the police court shall be such as are provided in section 1813 of the Revised Statutes; such as are provided in this act, and in all other acts or parts of acts applying to all cities of the state and not inconsistent herewith.<sup>3</sup> In case of the inability or absence of the solicitor or any of his assistants to act as prosecuting attorney of the police court, the provisions of section 1815 of the Revised Statutes shall apply.

(1) **Other statutes** relating to powers and duties of solicitor, not re-enacted and not repealed by the Code, may be found under **OFFICERS** in Part II.

(2) **Validity of limitation.**—The limitation in this section was held unconstitutional in *Horstman*

*v. St. Ry.* 1 N. P. (N. S.) 25; 13 Dec. 670.

(3) **As police court prosecutor.**—Other statutes relating to duties of solicitor as prosecuting attorney of the police court, not re-enacted and not repealed, may be found under **JUDICIAL** in Part II.

**Sec. 1776 R. S. [Pay over money.]** He shall pay over to the treasurer all moneys which may come into his hands belonging to the corporation, or which may come into his hands by way of fines, forfeitures, costs, or otherwise, and take the treasurer's duplicate receipt therefor, one of which he shall file with the clerk of the corporation, or in case there be an auditor, then with such auditor. [66 v. 175, § 158.]

**Sec. 1777 R. S. [City solicitor shall apply for injunction in certain cases.]** He shall apply in the name of the corporation,<sup>1</sup> to a court of competent jurisdiction for an order of injunction to restrain the misapplication of funds of the corporation, or the abuse of its corporate powers, or the execution or performance of any contract made in behalf of the corporation in contravention of the laws or ordinance governing the same, or which was procured by fraud or corruption. And he shall likewise, whenever an obligation or contract made on behalf of the corporation granting a right or easement, or creating a public duty, is being evaded or violated, apply for the forfeiture or the specific performance of the same as the nature of the case may require. And in case any officer or board fails to perform any duty expressly enjoined by law or ordinance, he shall apply to a court of competent jurisdiction for a writ of mandamus to compel the performance of such duty.<sup>2</sup> [87 v. 122; 81 v. 188, 189; Rev. Stat. 1880; 66 v. 175, § 159; (S. & C. 1559).]

(1) **Action in whose name.**—Where solicitor brings action in his own name as solicitor and taxpayer, though in behalf of the municipality, court may strike solicitor's name from title of cause and substitute name of municipality. L. S. & M. S. Ry. Co. v. Elyria, 69 O. S. 414.

(2) **Construction.**—§§ 1777 and 1778 are remedial and should receive a construction which will make the remedy a useful one. Gas and Water Co. v. Elyria, 57 O. S. 374, 383; Dorgan v. Columbus, 12 Dec. 121, 128; Rogers v. Railway Co., 12 Dec. 136; Fergus v. Columbus, 6 N. P. 82.

The solicitor may bring the suit in the name of a taxpayer, with his consent, although not requested in writing to do so. Cincinnati St. Ry. v. Smith, 29 O. S. 291.

No action of council is necessary to authorize solicitor to bring suit under this section. State ex rel. v. Bowers, 26 C. C. 326; 4 C. C. (N. S.) 345, (aff'd 70 O. S. 423).

For general matter relating to actions under this and succeeding section, see notes on page 343 *et seq.*

**Bond.**—The solicitor need not give bond in procuring injunction under this section. Forsythe v. Winans, 44 O. S. 277.

**Sec. 1778 R. S.** [When taxpayer may institute suit.] <sup>1</sup> In case he fail upon the request of any taxpayer of the corporation to make the application provided for in the preceding section, it shall be lawful for such taxpayer to institute suit for such purposes in his own name, on behalf of the corporation; <sup>2</sup> provided, that no such suit or proceeding shall be entertained by any court until such request shall have been first made in writing, <sup>3</sup> and further, provided that no such suit or proceeding shall be entertained by any court until such taxpayer upon motion of the solicitor or corporation counsel shall have given security for the costs of the proceeding. [95 v. 317; 87 v. 122; 67 v. 72, § 160; (S. & C. 1559).]

(1) **Section given as amended** in 95 O. L. 317. Though the section is referred to in the Code as the section contained in the Revised Statutes, the re-enactment is to be taken as including the section as amended; (§ 212 of the Code).

**Constitutionality** of section upheld. Horstman v. St. Ry., 13 Dec. 670; 1 N. P. (N. S.) 25.

(2) **Purpose of provisions.**—The object of §§ 1777 and 1778 is not to subserve the personal interests or protect any individual right peculiar to the taxpayer, but to protect the municipal corporation. Knorr v. Miller, 5 C. C. 609 (affirmed 27 B. 64); Gallagher v. Johnson, 31 B. 24; Hensly v. Hamilton, 3 C. C. 201; Peppard v. Cincinnati, 6 N. P. 57; State v. Bowers, 26 C. C. 326; 4 C. C. (N. S.) 345 (aff'd 70 O. S. 423).

The only question in such case is whether there has been a violation of corporate rights and this is one between the municipality and its officers. The other party to an alleged illegal municipal contract cannot come into the case and ask to have his rights determined. Johnson v. Farley, 8 N. P. 498.

The taxpayer's right at common law to enjoin abuse of corporate power and misapplication of public funds by municipal officers existed and was recognized independent of these statutes, which limit and regulate the bringing of such suits. Raynolds v. Cleveland, 13 Dec. 125 (reversed on other grounds, 24 C.

C. 215); Cincinnati St. Ry. v. Smith, 29 O. S. 291.

**In what cases action lies.**—The abuse of corporate powers, within the meaning of § 1777, includes the unlawful exercise or powers possessed by the corporation as well as assumption of power not conferred. Gas & Water Co. v. Elyria, 57 O. S. 374.

Injunction will lie to prevent a bond issue to raise a fund to be applied for an object unauthorized and void. *Ib.*

Every contract made in violation of the law or ordinance governing the matter is an abuse of corporate power. Shaw v. Jones, 4 N. P. 372.

A taxpayer may enjoin the municipality from allowing the use of its streets for laying pneumatic tubes for carrying packages by compressed air, where the grant is unlawful. Ampt v. Cincinnati, 21 C. C. 300.

Solicitor has power to bring action for forfeiture of franchises granted to a gas company. Columbus v. Federal Gas & Fuel Co., 14 Dec. 261 (aff'd 72 O. S. 637).

As to injunction by taxpayer against change of grade of street, see Corry v. Cincinnati, 22 B. 194.

City may bring action against interurban company coming into municipality by virtue of § 3443-11 for failure of such company to give transfers, etc., and otherwise comply with conditions imposed on city company. Cincinnati v. St. Ry. Co., 16 Dec. 220; 3 N. P. (N. S.) 489.

Taxpayer may enjoin council



from removing mayor under an invalid ordinance, as both a misapplication of funds and an abuse of corporate power. *Dorgan v. Columbus*, 12 Dec. 121. But see *Shaw v. Jones*, 4 N. P. 372.

Taxpayer may enjoin awarding municipal contract, as for a street improvement, to one not the lowest bidder. *Tucker v. Newark*, 19 C. C. 1, 3; *Pease v. Ryan*, 7 C. C. 44.

Municipality may be enjoined from paying money to a water company in pursuance of a contract, claimed to be illegal to pay hydrant rentals for fire purposes, as a misappropriation of funds and performance of a contract in contravention of law. *Defiance v. Council*, 23 C. C. 96, (reversed on other grounds, 68 O. S. 520).

Expenditure of public funds by municipal officers in exploitation of a particular system of valuing property for taxation may be enjoined without regard to the merits of the system. *Crawford v. Madigan*, 13 Dec. 494.

*Street railway grants.*—Grant of franchise to street railway company is a contract on behalf of the city within meaning of sec. 1777. *Cincinnati St. Ry. Co. v. Smith*, 29 O. S. 291. See, as to actions by taxpayers relating to street railway grants, notes under sec. 2501 R. S. on page 148.

But want of consents of abutting owners will not be ground for taxpayer's injunction against street railway grant. See note 5, "Right of action for want of consents," p. 153.

*Where other remedy.*—Action by taxpayer is not barred because there may be a remedy by the state by action of *quo warranto*. *Horstman v. St. Ry. Co.*, 13 Dec. 670; *Elyria v. Ry. Co.*, 12 Dec. 609 (69 O. S. 414).

**Character of action.**—Solicitor may have mandatory injunction to compel gas company to charge for gas, the price required by ordinance. *Gas Light Co. v. Zanesville*, 47 O. S. 35.

He may have a mandatory injunction to compel a gas company to carry out its contract with the municipality. *Toledo v. Gas Co.*, 5 C. C. 557.

One with whom the municipality has made an illegal contract may be enjoined from performance, al-

though the municipality has fully performed. *Haskins v. Cincinnati Con. St. Ry. Co.*, 4 B. 1126.

**Legislation cannot be enjoined,** but if the object of an ordinance is illegal, injunction will lie to prevent its being carried out. *Moore v. Hoffman*, 2 C. S. C. R. 453; *Johnson v. Cincinnati*, 26 B. 223.

A taxpayer cannot complain that a city's acts, under legislative authority, will violate the obligation of the city's contracts. Only the creditor can complain in such case. *Cincinnati v. Dexter*, 55 O. S. 93.

**When sections do not apply.**—These sections do not apply to actions against board of education. *Youmans v. Board of Education*, 13 C. C. 207. But a taxpayer might, independently of these sections, bring suit to restrain the board of education from doing an illegal act. *Ib.*; *Weir v. Day*, 35 O. S. 145, 146.

Contract by police commissioners which is illegal, but does not involve a use of city funds, is not enjoinable under this section as an abuse of corporate power of the city. *Fitzpatrick v. Bromwell Co.*, 5 N. P. 165.

Police funds, under former statutes, were held not to be city funds, within the meaning of these sections. *Yaple v. Police Commissioners*, 2 C. C. 406.

A taxpayer cannot maintain a suit to enjoin one railroad company from transporting the cars of another across the city streets on the ground that the contract between the two companies is *ultra vires*. *Rogers v. Ry. Co.*, 47 B. 83.

These sections have no application to an action by owners seeking to enjoin sale of their property to pay assessments, on the ground that the ordinance for the improvement is an unreasonable one. *Mills v. Norwood*, 6 C. C. 305.

Nor an action by abutting property owner to enforce the proper use of the streets in front of his property. *Herrick v. Cleveland*, 7 C. C. 470.

The lowest bidder for a municipal contract cannot, as such, enjoin the offices from rejecting all bids, though as a taxpayer he might proceed under these sections, and then he must first apply to solicitor. *Johnson v. Westside St. Ry.*, 10 B. 345; *Johnson v. Cincinnati*, 26 B.

223; but see *Lake Shore Foundry v. Cleveland*, 8 C. C. 671; *Mathers v. Cincinnati*, 3 B. 709.

Where there is no solicitor of the municipality, § 1777 R. S. does not apply and the taxpayer may sue on behalf of the corporation without previous written request. *Cope v. Wellsville*, 25 B. 250.

An abutting owner as such cannot enjoin a contract for improvement because of defects in proceedings before any assessment has been levied against him or any work done. A taxpayer suing on behalf of the corporation might do this, under § 1778, but this is a special provision and is not to be applied to other cases than those mentioned. *Wood v. Pleasant Ridge*, 12 C. C. 177.

So an abutting owner cannot enjoin laying natural gas pipes in street, because question not submitted to popular vote as required by law. Only the public can sue in such case. *Webb v. Ohio Gas Fuel Co.*, 16 B. 121.

Sections do not provide for recovery back of money unlawfully expended, but only the restraining of unlawful disbursements not yet made. *Crawford v. Madigan*, 13 Dec. 494.

Nor for recovery of money alleged to be fraudulently withheld from the municipality. *Nicholson v. Maile*, 15 Dec. 682; 3 N. P. (N. S.) 201; *State v. Zumstein*, 4 C. C. 268.

Nor for recovery of a claim against the municipality. *State ex rel. v. Roebuck*, 15 Dec. 400.

**When brought.**—In enjoining illegal bond issue or tax levy it is not necessary to wait until the fund is raised. *Gas & Water Co. v. Elyria*, 57 O. S. 374, 383. In enjoining street railway grant it is not material that franchise is not to go into effect until many years later. *Horstman v. St. Ry. Co.*, 14 Dec. 545. An action to enjoin payment under a contract on ground of invalidity *ab initio* of contract, is barred under § 4985 R. S., in ten years from time contract was entered into. *Defiance Water Co. v. Defiance*, 68 O. S. 520. Where operation under illegal franchise constitutes public nuisance statute of limitations does not apply. *Horst-*

*man v. St. Ry. Co.*, 13 Dec. 670; 1 N. P. (N. S.) 25.

**Estoppel to sue.**—For cases where municipality was held estopped to sue because it had permitted operation under the right or contract for many years and allowed large expenditures to be made without objection, see *Ampt v. Cincinnati*, 34 B. 111, 112; *Pugh v. Elec. Light Co.*, 19 C. C. 594; *Crawford v. Madigan*, 13 Dec. 494; *Columbus v. Federal Gas & Fuel Co.*, 14 Dec. 261 (aff'd 72 O. S. 632); *Columbus v. Bohl*, 13 Dec. 569; 1 N. P. (N. S.) 469. But see *Hertenstein v. Herrmann*, 6 N. P. 93 (where suit brought only four days after work begun); *Ross v. Columbus*, 8 N. P. 420 (where action begun before grant of franchise.) See also on the subject of estoppel, *Defiance v. Council*, 23 C. C. 96 (reversed other grounds, 68 O. S. 520), where making payments by city under contract held not to estop.

See also *Horstman v. St. Ry. Co.*, 12 Dec. 756 (no estoppel where municipality without power to act).

See further note "Estoppel," p. 372.

Action by one taxpayer is bar to similar action by another taxpayer, although not a resident at the time of first action. *Hallock v. Columbus*, 1 N. P. (N. S.) 205; 13 Dec. 488. See also *Atlas Bank v. Columbia Tp.*, 13 Dec. 472.

**Contracts made under law formerly considered constitutional.**—*Effect of subsequent contra ruling.*—Where contracts have been made or obligations entered into on the faith of a certain, definite and apparently fixed construction of the constitution by the highest court, such contracts will not be invalidated nor such obligations avoided by the subsequent judgment of the court that the former construction was erroneous. *Friedman v. Cincinnati*, 13 Dec. 404. See *Alter v. Cincinnati*, 56 O. S. 47; *Atlas Bank v. Columbia Tp.*, 13 Dec. 472; *Gault v. Columbus*, 13 Dec. 575; 1 N. P. (N. S.) 201; *Lewis v. Symmes*, 61 O. S. 475; *Douglas v. Pike Co.*, 101 U. S. 677.

Contracts for necessary public improvements entered into under a special act, but before May 1, 1903, may be upheld and work thereun-



der allowed to continue, though the law may be unconstitutional under recent decisions of the Supreme Court. *Columbus v. Bohl*, 1 N. P., 469; 13 Dec. 569.

**Interest of taxpayer.**—The taxpayer need not have a private interest peculiar to himself, and not shared by all taxpayers, in order to proceed. *Rogers v. Ry. Co.*, 12 Dec. 136; *Knorr v. Miller*, 5 C. C. 609.

As to whether, in order to maintain the suit the taxpayer must show that by increase in taxation or otherwise, expense will be put upon him. See *Buning v. St. Ry. Co.*, 1 C. C. 323; *Cincinnati v. Allison*, 12 Dec. 376; *Sommers v. Cincinnati*, 8 Rec. 612; and see *Sloane v. Ry. Co.*, 7 C. C. 84; *Knorr v. Miller*, 5 C. C. 609; *Landis v. Darke County* (Supreme Ct. not rep.), 32 B. 313. *Fergus v. Columbus*, 6 N. P. 82.

Time of payment of taxes is not material in determining whether the plaintiff is a taxpayer. *State ex rel. v. Taylor*, 16 Dec. 66.

**Motive of taxpayer** in bringing the suit has been held to be immaterial. *Peppard v. Cincinnati*, 6 N. P. 57; *Raynolds v. Cleveland*, 24 C. C. 215; 2 C. C. (N. S.) 139.

But see *contra*, *Gallagher v. Johnson*, 31 B. 24; *Ampt v. Cincinnati*, 2 N. P. (N. S.) 489; 15 Dec. 237. And see also *Brown v. Toledo*, 10 C. C. 642, 645; *Johnson v. Farley*, 8 N. P. 498; *Fergus v. Columbus*, 6 N. P. 82. However, in *McClain v. McKisson*, 15 C. C. 517 (affirmed 54 O. S. 673) it was held that the fact that the taxpayer was to be indemnified for his expenses by a beneficiary of the action, viz.: a lower bidder, would not defeat the right to sue, the taxpayer desiring for his own part to bring the suit. But see *Vadakin v. Crilly*, 7 C. C. (N. S.) 341 (aff'd 73 O. S. 380).

**Non resident taxpayer.**—A taxpayer, though a non-resident, may sue under §§ 1777 and 1778 R. S. *McClain v. McKisson*, 15 C. C. 517; (affirmed, 54 O. S. 673).

**Prosecuting error.**—Taxpayer may, upon refusal of solicitor, after request, in case brought under § 1777, prosecute error himself. The right to do so is within the spirit of §§ 1777 and 1778. *Pugh v. Electric Light Co.*, 19 C. C. 594.

**Pleading and practice.**—*Character of Petition.*—The action must be brought by the taxpayer for the use of the municipal corporation and not in his own behalf as taxpayer. *Hensly v. Hamilton*, 3 C. C. 201; *Wood v. Pleasant Ridge*, 12 C. C. 177; *Hallock v. Columbus*, 13 Dec. 488; 1 N. P. (N. S.) 205; and this is so when the solicitor brings the suit for the taxpayer. *Miller v. Pearce*, 2 C. S. C. R. 44, 51.

Capacity of plaintiff to sue in a taxpayer's action must appear in the petition, and a mere allegation that he is a resident and taxpayer of the municipality without averring that the suit is brought on behalf of the corporation is bad on demurrer; but this omission may be remedied by amendment by interlineation. *State v. Hinkle*, 13 Dec. 165; *Shaw v. Jones*, 4 N. P. 372. But the caption of the petition need not show that plaintiff is a taxpayer. *Ampt v. Cincinnati*, 5 N. P. 98.

Where an injunction is brought to prevent the carrying out of the object of legislation on the ground that the legislation was not enacted in good faith, it is not sufficient to aver that trading of votes and persuasion of one member induced others to vote as they did. *Mills v. Norwood*, 26 B. 348.

A mere averment that a certain bidder for a municipal contract was the lowest and that a certain other bidder was not the lowest and that the contract was awarded to the latter, does not, standing alone, state a cause of action. *Coppin v. Herrmann*, 7 N. P. 528 (affirmed, 63 O. S. 572).

Plaintiff in an action in man-



damus to compel the performance of a public duty is not required to plead or prove more than that the defendant officer is refusing to discharge a duty imposed upon him by law. *State v. Hinkle*, 13 Dec. 165.

Petition asking court to restrain alleged illegal payments to a water company, when raises issue of validity of contract with such company, see *Defiance v. Council*, 23 C. C. 96 (reversed other grounds, 68 O. S. 520).

Demurrer to petition on ground that plaintiff has not capacity to maintain the action, raises the question as to whether the action comes within scope of sections under which it is brought. *Nicholson v. Maile*, 15 Dec. 682; 3 N. P. (N. S.) 201.

Where it is shown that the injury complained of is not threatened, injunction will not lie. *Fritter v. Bohl*, 2 N. P. (N. S.) 365.

**Parties.** — Two taxpayers may join in the same suit for injunction. *Mathers v. Cincinnati*, 3 B. 551.

The city and not council or officers should be made defendant in an action to enforce the duty of council or other boards to keep the streets free from obstruction. *Herrick v. Cleveland*, 7 C. C. 470.

City need not be made a party where the action is to enjoin awarding the grant of a street railway route to one not the lowest bidder.

*Knorr v. Miller*, 25 B. 128; 27 B. 64.

A successful bidder who received the award sought to be enjoined, should be made a party defendant. *Fergus v. Columbus*, 6 N. P. 82.

So, a company claiming under the grant or ordinance sought to be enjoined should be made a party. *Ampt v. Cincinnati*, 6 N. P. 401.

**Situs.**—Where a municipality is situated in two counties local actions must be brought in the county where its municipal officers and government are located. *Fostoria v. Fox*, 60 O. S. 340.

(3) **Request to solicitor.**—Taxpayer cannot sue until he has requested the solicitor to sue and the solicitor has refused. *Findlay Gas Light Co. v. Findlay*, 2 C. C. 237. Request must be made, even though it would probably be futile. *Ib.* And though the suit is to enjoin an act wholly beyond the power of the municipality. *Ib.*

Request by another taxpayer after suit brought, will not be sufficient. *Ib.*

The petition should show request to solicitor and his refusal, but omission may be cured by amendment. *Brown v. Toledo*, 10 C. C. 642.

As to length of time solicitor may hold request without response before it can be said he has neglected to act, see *Ampt v. Cincinnati*, 2 N. P. (N. S.) 489; 15 Dec. 237.

**Sec. 1779 R. S.** [Duty of court; costs.]<sup>1</sup> If the court hearing such case is satisfied that such taxpayer had good cause to believe that his allegations were well founded, or if the same is sufficient in law, it shall make such order as the equity and justice of the case demand;<sup>2</sup> and in such case the taxpayer shall be allowed his costs; provided that if judgment is finally ordered in favor of such taxpayer he may be allowed as part of the costs a reasonable compensation for his attorney.<sup>3</sup> [95 v. 317; 66 v. 175, § 161; (S. & C. 1559).]

(1) Section given as amended in 95 O. L. 317. See note (1) to § 1778 R. S., p. 343.

(2) Decree.—Under the power to make such order as equity demands, the court cannot annex a

condition to its decree, enjoining an illegal award, that the city pay for work already done. *Hertenstein v. Herrmann*, 6 N. P. 93, 99.

This section contemplates that the court is not to be bound by hard and fast rules, and a taxpayer is not entitled to relief where he seeks to compel the city to do what is manifestly inequitable and unjust. *Friedman v. Cincinnati*, 13 Dec. 404; *Fergus v. Columbus*, 6 N. P. 82, 93.

**Injunction pendente lite** not granted where exercise of power by company under ordinance will be beneficial to city and no rights will be prejudiced thereby. *Ross v. Columbus*, 8 N. P. 420.

(3) **Costs and fees.**—If suit was founded on defects and irregularities that might reasonably seem to justify it, court may apportion costs. *Sloane v. People's Electric Ry.*, 7 C. C. 84, 94.

The taxpayer must show reasonable cause for suit, to claim costs. *Miller v. Pearce*, 2 C. S. C. R. 44.

As to whether the motive of the

taxpayer affects the question of his rights to costs and attorney's fees, see *Brown v. Toledo*, 10 C. C. 642; *Peppard v. Cincinnati*, 6 N. P. 57.

**Attorney's fees.**—Under former § 1779, before amendment in 95 O. L. 317, the taxpayer was entitled to his costs and compensation to his attorney if he had good cause to believe his allegations were well-founded or if the same were in fact sufficient. The taxpayer may now be allowed attorney's fees only in case final judgment is rendered in his favor.

In villages where there is no village solicitor, a taxpayer bringing an action under §§ 1777 and 1778 is not entitled to have attorney's fees included in the costs allowed him. *Kissell v. Columbus Grove*, 34 B. 50; 53 O. S. 650; *Brundige v. Ashley*, 62 O. S. 526.

The amount of attorney's fees allowed, should be measured by what public officers receive, rather than by what an attorney in private practice would receive for the same service. *Guckenberger v. Dexter*, 18 C. C. 244.

**Sec. 1780 R. S.** [Annual report.] He shall make a report annually to the council, at their first regular meeting in April, of the business of his office, and the moneys by him collected, during the year preceding the first day of April, and such other matters as he may deem proper, in order to promote the good government and welfare of the corporation. [66 v. 175, § 162.]

**Sec. 1813 R. S.** [Prosecuting attorney and assistants.] The prosecuting attorney of the police court shall prosecute all cases brought before such court, and perform the same duties, as far as the same are applicable to the police court, as required of the prosecuting attorney of the county; and except in cities of the first grade of the first class, the prosecuting attorney may appoint not to exceed three assistants who shall be assistant prosecuting attorneys of the police court, and perform the same duties, so far as applicable to the police court as performed by the prosecuting attorney of the police court.

The persons thus appointed shall be subject to the approval of the city council and such assistants shall receive for their services in city cases such salaries as the council may prescribe, and the county commissioners may allow such further compensation as they deem proper.<sup>1</sup> [95 v. 86; 84 v. 26, 28; 66 v. 179, § 191; (S. & C. 1536).]

(1) **Section as amended.**—This section is given as amended April 2, 1902, as under § 212 of the Code, when a section is incorporated, an amendment to it continues in effect, though not mentioned. But as to the effect of the provision making

an exception in case of a grade and class of cities, see note "Grades and classes under new Code," under § 1599 R. S., page 31; and see State *ex rel.* v. Baker, 55 O. S. 1, and see note to § 190 of the Code.

**Sec. 1815 R. S. [Inability or absence of prosecuting attorney; substitute.]** When there is a temporary inability or absence of such prosecuting attorney, or a vacancy of the office by resignation, death, or otherwise, the judge of the police court, or if there be more than one judge of said court, then the judges thereof, shall appoint some competent member of the bar to perform the duties of the office,<sup>1</sup> such appointee shall act until the removal of the inability, or the return of such prosecuting attorney, and in case of vacancy until his successor shall be elected at the next annual municipal election and has duly qualified. Said appointee shall qualify in the same manner, shall have the same power and authority to discharge the same duties, be subject to the same liabilities, and shall receive the same salary as the officer whom said appointee succeeds [succeeds]; but in case of inability or temporary absence of such prosecutor the judge may deduct such amount from the salary of such prosecuting attorney. [94 v. 69; Rev. Stat. of 1880; 66 v. 179, § 193.]

(1) **Defective appointment.**—Where the judge has erred in making the appointment of an acting prosecutor, such appointee is nevertheless, a *de facto* officer. *Ermston v. Cincinnati*, 7 N. P. 635.

The finding of the judge that the

prosecuting attorney is absent, as a condition precedent to appointment of an acting prosecutor, is not conclusive of the fact, in a suit by the appointee for compensation for his services. *Id.*



## (B) DEPARTMENT OF PUBLIC SERVICE.

(1) *General Administrative Powers.*

**Sec. 138.** [Department of public service; directors: number, election, term, qualifications, etc.] <sup>1</sup> In every city there shall be a department of public service which shall be administered by three or five directors and the number of said directors shall be fixed by ordinance or resolution of council.<sup>2</sup> Such directors shall organize as a board to be known as the "board of public service." Directors of public service shall be elected for a term of two years and shall serve until their successors are elected and qualified. They shall be electors of the city. They shall make their own rules and all regulations for the administration of affairs under their supervision.

(1) **Old sections.**—Compare sections relating to "city commissioners" in Code of 1852 (50 O. L. 249) and to "board of improvements" in Code of 1869 (66 O. L. 233); also § 2186 R. S. *et seq.* and § (1545-35) *et seq.* R. S. (director of public works, Cleveland); § (1545-143) *et seq.* R. S. (director of public works, Columbus); § (1545-240) *et seq.* R. S. (board of public affairs, Springfield); § (1545-296) R. S. (departments of public improvements and public works, Hamilton); § 2205 *et seq.* R. S. (board of public service, Cincinnati); § 1707d-1 *et seq.* (board of city affairs, Dayton);

§ 1545-270 (board of city commissioners, Akron and Youngstown); § 1707f-2 *et seq.* (board of public affairs, Portsmouth); 89 O. L. 24 (board of improvements, Ravenna), and other similar acts, all repealed.

(2) **Form of ordinance or resolution** fixing the number of directors of public service, see that given under § 117 of the Code, p. 307.

**Constitutionality of provision** authorizing council to determine number of directors of public service, affirmed. *Zumstein v. Mullen*, 67 O. S. 38.

**Sec. 139.** [General powers of board.] <sup>1</sup> The directors of public service shall be the chief administrative authority of the city, and shall manage and supervise all public works and all public institutions, except where otherwise provided in this act.

(1) **Old sections.**—Compare old (1545-296) R. S. (Hamilton); §§ (1545-37) R. S. (Cleveland); (2212) R. S. (Cincinnati) and (1545-145) R. S. (Columbus); see § 2192 R. S., all repealed. (1545-247) R. S. (Springfield);

**Sec. 140.** [Powers and duties.] <sup>1</sup> The directors of public service shall supervise the improvement and repair of streets,

avenues, alleys, lands, lanes, squares, wharves, docks, landings, market houses, bridges, viaducts, aqueducts, sidewalks, sewers, drains, ditches, culverts, ship channels, streams and water courses; the lighting, sprinkling and cleaning of all public places, and the construction of all public improvements and public works, except as otherwise provided in this act.<sup>2</sup>

(1) **Old sections.**— See note under § 139, *supra*, and see §§ 2207 and 2187 R. S., both repealed.

(2) **Council has control** and care of the streets, while the board of public service supervises the improvement of streets. See § 28 of the Code.

The authority to make appropriation for improving streets is vested in council, but the supervision and manner of doing the work are with the Board of Public Service. *State ex rel. v. Roebuck*, 15 Dec. 400.

**Powers strictly construed.**—

The powers of such a board as this, as prescribed by the statutory provisions, are to be strictly construed. It has only such powers as are expressly conferred and such as may arise by fair implication because essential to carry out the express powers. *State ex rel. v. Boyden*, 4 N. P. 322. See also as to construction of powers of municipal officers, *Bloom v. Xenia*, 32 O. S. 461; *Ravenna v. Penn. Co.*, 45 O. S. 118; *Buchanan Bridge Co. v. Campbell*, 60 O. S. 406; *Comstock v. Nelsonville*, 61 O. S. 288; *Lancaster v. Miller*, 58 O. S. 558; *Wellston v. Morgan*, 65 O. S. 219.

**Sec. 141. [Powers and duties.]**<sup>1</sup> The directors of public service shall have the management of all municipal water, lighting and heating plants, parks, baths, market houses, cemeteries, crematories, sewage disposal plants and farms, as well as all public buildings and other property of the corporation not otherwise provided for herein.<sup>2</sup>

Said directors of public service shall also manage and control all houses of refuge and correction, workhouses, city farm schools, infirmaries, hospitals, pest houses and all other charitable and reformatory institutions now or hereafter established or maintained by any city; and in the control and supervision of such institutions said directors of public service shall be governed by the provisions, so far as the same are consistent with this act, of sections 2050, 2051, 2052, 2053, 2053-1, 2053-2, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2081, 2092, 2093, 2094, 2099,

2100, 2102, 2105, 2106, 2165, 2168, 2169, 2171 and 2172 of the Revised Statutes of Ohio.

(1) **Old sections.**— See notes to parks, see *Cincinnati v. University*, §§ 139 and 140, *supra*. 13 Dec. 284.

(2) **Scope of power.**— As to

(2) *Houses of Refuge.*<sup>1</sup>

**Sec. 2050 R. S.** [When infants received.] The board<sup>2</sup> may, at its discretion, receive into such institution<sup>3</sup> infants under the age of sixteen years, committed to their custody in either of the following modes, to wit:

1. Infants committed by the mayor of the corporation, or any judge or justice of the peace of the county, on complaint and due proof by the parent, guardian, or next friend of such infant, that, by reason of incorrigible or vicious conduct, such infant has rendered his control beyond the power of such parent, guardian, or next friend, and made it manifestly requisite that, from regard to the future welfare of such infant, and for the protection of society, he should be placed under the guardianship of the board of directors of such house of refuge and correction.

2. Infants committed by the authorities aforesaid, where complaint and due proof have been made that such infant is a proper subject for the guardianship of the directors of such institution, in consequence of vagrancy, or of incorrigible or vicious conduct, and that from the moral depravity of the parent, guardian, or next friend, in whose custody such infant may be, or other cause, such parent, guardian, or next friend is incapable or unwilling to exercise the proper care and discipline over such incorrigible or vicious infant.

3. Infants who are without a suitable home and adequate means of obtaining an honest living, or who are in danger of being brought up to lead an idle or immoral life, may be committed to the guardianship of the directors of such institution, by the trustees of any township within the county in which such institution is situated, or by the mother, when the father is dead, or has abandoned his family, or does not provide for their support, or is an habitual drunkard.<sup>4</sup> [66 v. 189, § 238.]

(1) **Former provisions** relating to houses of refuge, embraced §§ 2031 to (2090-7) R. S., inclusive, being subdivisions I and II of Chap-6, Div. 5, Title 12. Of these, §§ 2031 to 2049 R. S., inclusive, and §§ 2079 to (2090-7) R. S., inclusive.

except §§ 2081 and 2090, are repealed. § 2081 is re-enacted in § 141 of the Code and § 2090 is made ineffective by repeal of other sections.

Sections 2083 to (2090-7) R. S., inclusive, were provisions relating



to houses of refuge "heretofore established," meaning before May 7, 1869, and applied only to such as were established before that date. See *House of Refuge v. Ryan*, 37 O. S. 197.

Now, however, the statutes re-enacted in the Code will apply to all houses of refuge.

**Power to establish houses of refuge** and to maintain them was formerly given in § 2031 R. S., repealed. This power is now conferred upon all municipalities in paragraph 20 of § 7 of the Code, page 59.

(2) **Board**, referred to here, was, under the old sections, the "board of directors of the house of refuge and correction" mentioned in old section 2032 R. S., repealed. But as the control of houses of refuge is now given to the board of public service (§ 141, *supra*) the word "board" or the word "directors" where either occurs in this or subsequent sections on this subject, must be taken to refer to the board or directors of public service.

(3) **Institution** here means house of refuge. This is made plain by the old sections (now repealed) preceding § 2050 R. S.

(4) **Validity**.—As to the constitutionality of a statute such as this, see *Prescott v. State*, 19 O. S. 184; *House of Refuge v. Ryan*, 37 O. S. 197, 204.

**Support of infants**.—Infants committed to a house of refuge and correction under § 2050 R. S. for "incurable conduct," are not committed "for offenses against a law of the State" within the meaning of § 2071 R. S., *infra*, and hence they must be supported as provided in § 2072 R. S., *infra*, and not by the county. *State v. Schlatterbeck*, 39 O. S. 268.

**Construction**.—§ 2050 R. S. provides that the board may at its discretion, receive infants committed for incurable conduct, etc.; §§ 2051, 2052 and 2053 R. S. *infra*, provide for commitment of such infants, convicted of crimes and offenses. *House of Refuge v. Ryan*, 37 O. S. 197.

**Sec. 2051 R. S. [Infants may be confined after conviction.]** An infant under the age of sixteen years, convicted of a misdemeanor, or an offense punishable by imprisonment under an ordinance of the city, or who has been ordered to be committed as prescribed in the last section, may be confined in such house of refuge and correction, under such rules and regulations as the directors<sup>1</sup> may prescribe; and the directors shall receive and take charge of any children committed to their custody by any court or officer, under a law of the state. [67 v. 75, § 239; (S. & C. 689).]

(1) **Directors** here must be taken to mean the directors of public service. See note (2) under § 2050 R. S., *supra*.

**Sec. 2052 R. S. [When infant may be put to hard labor.]** A minor, over the age of sixteen years, convicted of a violation of any ordinance, and liable to be punished therefor by imprison-

ment, or who may be liable to imprisonment for neglect or refusal to pay a fine imposed for the violation of an ordinance, may, in lieu thereof, be committed to the house of refuge and correction, and put to hard labor, in such manner as may be prescribed by ordinance of the council. [66 v. 190, § 240.]

**Sec. 2053 R. S. [Confinement of infants until of age.]** Any infant, under the age of sixteen years, who may be liable to confinement in the jail in any county in which a house of refuge and correction is situated, or in the penitentiary of the state from such county, or at the reform farm, may, at the discretion of the court, or magistrate, giving sentence, be placed in such institution until of legal age, under the exclusive control and guardianship of the directors thereof. [66 v. 190, § 241.]

**Sec. 2053—1 R. S. [Authority to commit children to houses of refuge; proviso.]** All courts or officers, who, by virtue of law now in force or hereafter to be enacted, have authority to commit infants to the care and guardianship of boards of directors of houses of refuge, or to the board of commissioners for reform schools, shall have the same power to commit such infants to the care and guardianship of the board of directors<sup>1</sup> of any house of refuge and correction in the state of Ohio, organized and erected by a municipal corporation with which the state of Ohio shall have made arrangements for the custody and care of such infants, that they now have to commit such youth, either to the custody of the board of commissioners of reform schools, or the directors of any house of refuge, whether such house of refuge and correction be located within the county where such commitment is made or not; provided, that all youths committed to any house of refuge under the provisions of this act who shall be, or whose parents or guardians shall be at the time of such commitment resident of any city or municipal corporation where such house of refuge is located, shall be kept and maintained at the expense of such city or municipal corporation. [73 v. 143.]

(1) See note (2) to § 2050 R. S., *supra*.

**Sec. 2053—2 R. S. [Boards in municipalities may receive children.]** It shall be lawful for the board of directors<sup>1</sup> of any house of refuge and correction situate in any municipal corporation, with which the state of Ohio shall have made arrangements for the custody and guardianship of infants un-

der the age of sixteen years, as provided in the preceding section, to receive into their care and guardianship all such infants committed to their custody. [73 v. 143.]

(1) See note (2) to § 2050 R. S., *supra*.

**Sec. 2054 R. S. [Commitment on recommendation of grand jury.]** If accusation of the commission of a crime is made against an infant under the age of sixteen years, before the grand jury of the county in which such house of refuge and correction is situated, and the charge appears to be supported by evidence sufficient to put the accused upon trial, the grand jury may, in its discretion, instead of finding an indictment against the accused, return to the court that it appears to them that the accused is a suitable person to be committed to the guardianship of the directors of the house of refuge and correction, and the court shall thereupon, on notice to the minor, and an opportunity to be heard, but without a jury, order such commitment.<sup>1</sup> [66 v. 190, § 242; (S. & C. 690).]

(1) **Validity.**—This section was Art. I. of the Constitution. Pres-  
held not repugnant to § 5 or § 10, cott v. State, 19 O. S. 184.

**Sec. 2055 R. S. [Commitment by court in certain cases.]** If an infant, under the age of sixteen years, be arraigned for trial in a court having criminal jurisdiction in a county in which a house of refuge and correction is situated, on a charge of a violation of any criminal law of this state, or ordinance of the corporation, the judge may, with the consent of the accused, arrest, at any stage of the cause, further proceedings upon the part of the prosecution, and commit the accused to the guardianship of the directors<sup>1</sup> of such institution. [66 v. 190, § 243: (S. & C. 690).]

(1) See note (2) to § 2050 R. S., *supra*.

**Sec. 2056 R. S. [Infants entitled to private examination and trial.]** Infants under the age of sixteen years who are accused of an offense punishable by imprisonment in a county in which a house of refuge and correction is situated, shall be entitled to a private examination and trial, to which only the parties shall be admitted, unless one of the parents, the guardian, or other legal representative demands a public trial, in which case all proceedings shall be in the usual form. [66 v. 191, § 244; (S. & C. 690).]



**Sec. 2057 R. S.** [Infants placed in refuge instead of jail.] An infant under the age of sixteen years who is committed for trial, or as a witness, in a county in which a house of refuge and correction is situated, shall be placed in such institution subject to the order of the court making such commitment, and in no case in the county jail. [66 v. 191, § 245; (S. & C. 690).]

**Sec. 2058 R. S.** [Disposition when refuge full.] If at any time a house of refuge and correction have as many infants under its charge as can be conveniently accommodated therein, or as many as the funds of such institution are adequate to maintain, the board<sup>1</sup> shall not be required to receive other infants, but shall order their chief officer to return that fact to any magistrate, court or person authorized to commit, who shall have sent an infant to such institution; and thereupon the case of such infant shall be disposed of as if this chapter had not been enacted, and as if no proceedings had taken place under it. [66 v. 191, § 246; (S. & C. 690).]

(1) See note (2) to § 2050 R. S., *supra*.

**Sec. 2059 R. S.** [Statement of age, residence, cause, etc., to be furnished.] In all cases where an infant is committed to the instruction and discipline of a house of refuge and correction, under the guardianship of the directors<sup>1</sup> thereof, the court or judge ordering such commitment shall, at the same time, furnish to the directors or officers of such institution a true statement, in writing, of the age of such infant, and the reason for such commitment; and until such statement is furnished, the directors or officers aforesaid may decline to receive such infant. [66 v. 191, § 247; (S. & C. 690).]

(1) See note (2) to § 2050 R. S., *supra*.

**Sec. 2060 R. S.** [What record of commitment shall contain.] In all cases where the commitment is ordered by an official person whose proceedings are usually evidenced by a record, or where the occasion of the commitment is a criminal charge against the infant, no other record shall be made, unless demanded by the infant, or his parents, or guardian, than that, in substance, such infant (naming him), who, on a day therein named, was of the age of — years, having been brought before such court or officer, and the court or officer having ascertained by the testimony of the witnesses therein named.

that such infant was a suitable person to be committed to the discipline and instruction of the house of refuge and correction, under the guardianship of the directors thereof, such infant was so committed, and delivered to the charge of such directors. [66 v. 191, § 248; (S. & C. 690).]

**Sec. 2061 R. S.** [Duration of commitment to reformatory institution; discharge, etc.] No commitment of an infant to a house of refuge and correction shall be for a shorter period than 'til [until] such infant shall be reformed or attain the age of majority except in case of infants committed to await their trial, or as witnesses, and except in such cases as the board may by its general rules, provide; but any infant by whomsoever or for whatever cause committed may at any time be discharged upon order of the board,<sup>1</sup> duly entered upon its minutes or may by order of the said board duly entered upon its minutes, be permitted to leave such institution until directed to return thereto by said board or the superintendent of such house; but said permission shall not in any way be construed to be a discharge from the said house and from the guardianship of the board of directors thereof.<sup>2</sup> [1881, April 20: 78 v. 253; Rev. Stat. 1880; 66 v. 191, § 249; (S. & C. 691).]

(1) See note (2) to § 2050 R. S., *supra*.

*habeas corpus.* House of Refuge v. Ryan, 37 O. S. 197, 201.

(2) **Validity.**—A section providing proceedings for and authorizing commitment of homeless children is not repugnant to § 14 or § 16, Art. I of the Constitution of Ohio, as the law provides full remedy by

The father, if an unsuitable person, is not entitled to the custody of the child, on the hearing of *habeas corpus*, on the ground that he had no notice of the proceedings under which the child was committed. *Id.*

**Sec. 2062 R. S.** [How minors employed.] The board<sup>1</sup> shall have power to place infants committed to its care, during their minority, at such employment for account of the institution or otherwise, and cause them to be instructed in such branches of useful knowledge, as may be suited to their years and capacities. [66 v. 192, § 250; (S. & C. 691).]

(1) See note (2) to § 2050 R. S., *supra*.

**Sec. 2063 R. S.** [Board may bind them as apprentices.] The board<sup>1</sup> shall have power, at discretion, to bind out the said infants committed to its care, with their consent, as apprentices during their minority, to such persons and at such places

to learn such proper trades and employments as in its judgment will be most conducive to their reformation and amendment, and as will tend to the future benefit and advantage of such infants. [66 v. 192, § 251; (S. & C. 691).]

(1) See note (2) to § 2050 R. S., *supra*.

**Sec. 2064 R. S. [Committee on indentures.]** The board <sup>1</sup> shall for such purpose, have power to appoint a committee of one or more of its number, with power to execute and deliver, on behalf of the board, indentures of apprenticeship for any infant in such institution whom it may deem a proper person for an apprenticeship; such indentures shall have the like force and effect as other indentures of apprenticeship under the laws of Ohio; the indentures shall be filed and kept in the office of such institution, and it shall not be necessary to file or record them in any other place or office. [66 v. 192, § 252; (S. & C. 691).]

(1) See note (2) to § 2050 R. S., *supra*.

**Sec. 2065 R. S. [When indentures to be canceled.]** In case an infant so apprenticed prove untrustworthy and unreformed, the board <sup>1</sup> may, at its discretion, permit such infant to be returned to such house of refuge and correction, to be held in the same manner as before such apprenticeship, and may thereupon order the indentures for such infant to be canceled. [66 v. 192, § 253; (S. & C. 691).]

(1) See note (2) to § 2050 R. S., *supra*.

**Sec. 2066 R. S. [When indentured infant returned to institution.]** If, in the opinion of the board,<sup>1</sup> an infant apprenticed by it has an unsuitable home, or if the person to whom such infant is indentured becomes unfit or incapable to properly raise or take care of such infant, the directors may, at their discretion, return such infant to the institution from which it was indentured. [66 v. 192, § 254; (S. & C. 691).]

(1) See note (2) to § 2050 R. S., *supra*.

**Sec. 2067 R. S. [Arrest of fugitives from refuge or apprenticeship.]** A fugitive from a house of refuge and correction, or a fugitive from apprenticeship under indentures executed as



above provided, may be arrested and returned to such institution by a sheriff or constable of any county in this state, or police officer of the corporation, or officer of such institution, on the written order of two directors<sup>1</sup> of such institution, directed to such officer, and may be delivered to the custody of such officer of the house of refuge and correction as the directors may name. [66 v. 192, § 255; (S. & C. 691).]

(1) See note (2) to § 2050 R. S., *supra*.

**Sec. 2068 R. S. [Stubborn infant: how dealt with.]** When an infant is convicted of an offense against the laws of this state, punishable with imprisonment in the penitentiary, or in the jail of the county where such house of refuge and correction is situate, and, under existing laws, is sent to the house of refuge and correction, instead of the penitentiary or jail, and refuses to submit to the rules of the institution, and proves to be stubborn and irreclaimable, in the opinion of a majority of the board,<sup>1</sup> such infant may, by its order, be delivered into the custody of the sheriff of the county, with a written statement of the cause of commitment, and of the conduct and character of such infant, as exhibited in such institution, which statement shall be prepared and signed by the superintendent. [66 v. 193 (192), § 256.]

(1) See note (2) to § 2050 R. S., *supra*.

**Sec. 2069 R. S. [Sheriff to notify prosecuting attorney in such case.]** It shall be the duty of the sheriff to receive such infant into his custody, and file the statement in the office of the clerk of the Court of Common Pleas, or in the office of the clerk of the court in which such infant was tried, and to notify the prosecuting attorney of the county thereof. [66 v. 193, § 257.]

**Sec. 2070 R. S. [Stubborn infants: final disposition.]** The prosecuting attorney on receiving such notice shall cause such infant to be brought before the Court of Common Pleas, or before the court in which such infant was tried, to receive the sentence which the court deems just, according to the law, for the offense of which such infant was convicted as aforesaid. [66 v. 193, § 258.]

**Sec. 2071 R. S. [How expenses shall be paid.]** The expense of maintaining infants committed to a house of refuge and

correction, by a court or magistrate of the county in which such institution is situated, or by the police or other court of the corporation, for offenses against a law of the state, or for trial, or as a witness, shall be paid by the county; and the expense of infants committed by [township trustees shall be paid by the township, and of those committed by] parents and guardians shall be paid by them, except in cases where the board <sup>1</sup> otherwise determine; all which expense shall be ascertained and fixed by the board.<sup>2</sup> [66 v. 193, § 259; (S. & C. 691).]

(1) See note (2) to § 2050 R. S.,  
*supra*.

(2) **Support of infants.**—See  
note (4) to § 2050 R. S. *supra*.

**Sec. 2072 R. S. [Deficiency: how raised.]** The expense of maintaining and administering the affairs of houses of refuge and correction, above the receipts thereof, shall be audited and paid, from time to time, by the council of the corporation; and a tax for such expense shall be levied and collected as a part of the ordinary expenses of the corporation.<sup>1</sup> [66 v. 193, § 260.]

(1) See note (4) to § 2050 R. S., *supra*.

**Sec. 2073 R. S. [Return to habeas corpus.]** It shall be a sufficient return to a writ of *habeas corpus*, directed to any person or officer, inquiring into the cause or detention of an infant committed to a house of refuge and correction, that the infant named in the writ, was, on a day therein named, committed to the guardianship of the directors <sup>1</sup> of the house of refuge and correction, in the city or village of — (as the case may be), by the person or officer who executed the commitment, naming him, until such infant should arrive at legal age, and that that period has not arrived; but the court, nevertheless, or a judge thereof, shall have the power on *habeas corpus* specified in section *two thousand and sixty-one*. [66 v. 193, § 261; (S. & C. 692).]

(1) See note (2) to § 2050 R. S., *supra*.

**Sec. 2074 R. S. [Commitment: how far examinable.]** Where a commitment has, in fact, been executed by a person authorized by this chapter <sup>1</sup> to execute it, the existence of the circumstances justifying its execution shall not be otherwise examinable than in an action against the directors <sup>2</sup> of such institution,

as provided in this chapter; but the court or judge on *habeas corpus* shall have the power mentioned in said section *two thousand and sixty-one*. [66 v. 193, § 262; (S. & C. 692).]

(1) See note (1) to § 2050 R. S. (2) See note (2) to § 2050 R. S., *supra*.

**Sec. 2075 R. S. [Aggrieved party may apply to the board.]** If a parent, guardian, master to whom an infant has been apprenticed, a person occupying the position of parent, protector, or guardian, in fact, or a relative by blood or marriage, not further remote than first cousin to such infant, feels aggrieved by the commitment of an infant to the directors of a house of refuge and correction, by a person authorized by this chapter<sup>1</sup> to commit such infant, he may make a written application to the board,<sup>2</sup> at such time as the directors, by rule or resolution, provide for hearing applications, not later than the next regular meeting of the board, to have the infant delivered to him; which application shall state the ground of the applicant's claim to the custody of such infant, and the reason for claiming such custody. [66 v. 194 (193), § 263; (S. & C. 692).]

(1) See note (1) to § 2050 R. S. (2) See note (2) to § 2050 R. S., *supra*.

**Sec. 2076 R. S. [Decision of application.]** Within ten days after hearing such application, the directors<sup>1</sup> shall decide; and if they be of opinion that the welfare of such infant will be promoted by granting the application, they shall make an order to that effect; otherwise they shall decline the application.<sup>2</sup> [66 v. 194, § 264; (S. & C. 692).]

(1) See note (2) to § 2050 R. S., of the board at which a majority is present uniting in the action. *Ex supra*.

(2) **How order made.**—Such *parte* Walker, 8 B. 198.  
order should be made at a meeting

**Sec. 2077 R. S. [Action against directors.]** The applicant may, if the application be declined, upon first giving security for the payment of costs, commence an action against such directors<sup>1</sup> in the Court of Common Pleas or Superior Court of the county in which the house is situated, for the recovery of the infant, or his liberation; which action shall be conducted in all respects as actions under the Code of Civil Procedure, except the case shall have precedence of all others in the time of trial. [66 v. 194, § 265; (S. & C. 692).]

(1) See note (2) to § 2050 R. S., *supra*.



**Sec. 2078 R. S. [Costs in such cases.]** The costs of such action shall be paid by the applicant, or out of the county treasury, unless the court certify in the journal entry of the judgment, that the refusal of the directors<sup>1</sup> to grant the application of the plaintiff was plainly unreasonable, or the original commitment manifestly improper and unnecessary, in which case the costs shall be taxed against the party in fault, on notice to him. [66 v. 194, § 266; (S. & C. 692).]

(1) See note (2) to § 2050 R. S., *supra*.

**Sec. 2081 R. S. [Action against directors: where brought; service.]** Actions may be brought by and against the directors<sup>1</sup> of the house of refuge and correction, before any court of competent jurisdiction; and process may be served by leaving a copy of the writ with a director, or at the office of such institution, with any officer thereof. [66 v. 194, § 269; (S. & C. 692).]

(1) See note to § 2050 R. S., *supra*.

### (3) *City Prisons and Station Houses.*<sup>1</sup>

**Sec. 2092 R. S. [Sustenance, etc., for prisoners.]** The marshal, chief of police, or superintendent, as the case may be, shall provide all persons confined in such prison or station-houses with necessary food during such confinement, and see that such places of confinement are kept clean and made comfortable for the inmates thereof. [66 v. 186, § 216.]

(1). **Former provisions** relating to subject of corporation prisons and station houses were contained in subdivision 3, Chap. 6, Div. 5, Title XII R. S., §§ 2091-2094 R. S., inclusive, of which only § 2091, giving control of such institutions to the marshal or chief of police, is repealed.

**Management of prisons and station houses.**—§ 141 of the Code gives to board of public service the management and control of all houses of refuge, workhouses, city farm schools, infirmaries, hospitals, pest houses and "all other charitable and reformatory insti-

tutions," etc., and provides that "in the control and supervision of such institutions said directors of public service shall be governed by the provisions" of certain sections of the Revised Statutes, among them §§ 2092, 2093 and 2094, referring to city prisons and station houses. But see §§ 147, 149 and 166 of the Code, which confer all power with respect to the government of the police department and the appointment of station house keepers upon the mayor and the board of public safety; and see § 154 of the Code which gives to the board of public safety certain powers with respect

to the erection and repair of station houses.

**Power to establish prisons and station houses** was formerly given

in § 2091 R. S., repealed. This power is conferred upon all municipalities in paragraph 20 of § 7 of the Code, page 59.

**Sec. 2093 R. S. [Provision therefor by council.]** The council shall provide, by ordinance, for sustaining all persons sentenced to or confined in such prison or station-houses, at the expense of the corporation; and on the presentation of bills for food, sustenance, and necessary supplies, to the proper officer, certified by such person as the council may designate, such officer shall audit the same, under such rules and regulations as the council may prescribe, and draw his order on the treasurer of the corporation in favor of the officer presenting such bill; but the amount shall not exceed forty cents a day for any person so confined. [66 v. 186, § 217.]

**Sec. 2094 R. S. [Disposition of prisoners where there is no work-house.]** In corporations in which there is no work-house, the council may, by ordinance, provide for the keeping of persons convicted and sentenced to hard labor, during the term of their imprisonment, at such place or places within the corporation as the council may determine. [66 v. 186, § 218.]

#### (4) *Work-houses.*<sup>1</sup>

**Sec. 2099 R. S. [Who shall be sentenced to work-house.]** When a person over sixteen years of age is convicted of an offense, under the law of the state or an ordinance of a municipal corporation, and the tribunal before which the conviction is had is directed by law to commit the offender to the county jail or corporation prison, the court, mayor, or justice of the peace, as the case may be, shall sentence the offender to the work-house, if there is such house in the county; provided, that when a commitment is made from a city, village, or township in the county, other than in the municipality containing such work-house, the council of such city or village, or the trustees of such township, shall transmit with the mittimus a sum of money equal to forty cents per day for the time of such commitment, to be placed in the hands of the superintendent of such work-house, for the care and maintenance of such prisoner.<sup>2</sup> [73 v. 211, § 275.]

(1) **Former provisions** relating to workhouses were contained in Subd. 4, Chap. 6, Div. 5, Title XII

R. S., §§ 2095 to (2107-17) R. S., inclusive. Of these §§ 2095 to 2098 R. S., inclusive, 2099a to 2099c R.

S., inclusive, 2100a, 2100b, 2100d, 2100e, and 2104 R. S.; are repealed by the code, §§ 2107-1 to 2107-17 inclusive were repealed April 26, 1904 (97 O. L. 449).

The sections not specifically reenacted by § 141 of the Code, and not repealed are §§ 2100c (relating to habitual offenders), 2101 (prompt commitment and fees), 2103 (punishment for escape), 2107 (erection of workhouse by city and county jointly), 2107a (1) (receiving persons sentenced from other counties), 2107a (2) to 2107e (1) (workhouses erected by counties jointly), 2107a (3) to (2107w)

workhouses in Muskingum county. For the sections not repealed and not expressly re-enacted, see Part II under CHARITABLE AND REFORMATORY INSTITUTIONS.

**Power to establish work-houses,** see paragraph 20 of § 7 of the Code, page 59.

(2) **Validity.**—This section was held constitutional in *Kimbleawecz v. State*, 51 O. S. 228.

**Discretion of court.**—It is discretionary with the court whether a minor under the age of sixteen shall be confined in the workhouse or house of refuge. *Ex parte Walker*, 8 B. 198.

**Sec. 2100 R. S. [Labor of prisoners sentenced to work-house; their discharge.]** A person so sentenced shall be received into such work-house, and shall be kept and confined at labor therein, or if such labor cannot be furnished therein, then such person may be employed at hard labor elsewhere within the limits of the corporation where such employment shall be authorized by ordinance, and shall be subject to the rules, regulations and discipline thereof, until the expiration of his sentence, when such person shall be discharged; but no person committed or held in default of the payment of a fine, penalty, or costs of any prosecution, shall be released under the laws providing for the relief of insolvent debtors.<sup>1</sup> [1885, April 9: 82 v. 117; Rev. Stat. 1880; 66 v. 195, § 276.]

(1) Release of insolvent debtors provided in § 6379 R. S.

**Sec. 2102 R. S. [Discharge and record thereof; parole; rules and regulations and conditions.]** Any board vested by statute with authority to manage any workhouse, now or hereafter established, shall have power to discharge, for good and sufficient cause, a person committed to such workhouse; but a record of all such discharges shall be kept and reported to the council, in the annual report of the board, with a brief statement of the reasons therefor. Said board shall also have power to establish rules and regulations under which, and to specify the



conditions on which, any prisoner may be allowed to go upon parole outside of the buildings and enclosures, but to remain, while on parole, in the legal custody and under the control of said board, and subject at any time to be taken back within the enclosure of said institution; and full power to enforce such rules, regulations and conditions, and to retake and reimprison any convict so upon parole, is hereby conferred upon said board, whose written order, certified by its secretary, shall be sufficient warrant for all officers named therein to authorize such officers to return to actual custody any conditionally released or paroled prisoner; and it is hereby made the duty of all officers to execute said order the same as ordinary criminal process; and said board may employ or authorize any person or persons to see that the conditions of said parole are not violated, and in case of such violation to return to said workhouse any such prisoner so violating said parole, and the time between the violation of the conditions of such parole, or conditional release (by whatever name), as entered by order of such board on the records of the workhouse and the reimprisonment or return of such prisoner, shall not be counted as any part or portion of time served under any sentence; and any prisoner at large upon such parole who fails to return to the actual custody of said workhouse as may be specified as one of the conditions of his parole, or commits a fresh crime and is convicted thereof, shall be, on the order of said board, treated as an escaped prisoner and subject to the penalties named in section two thousand one hundred and three (2103) of the Revised Statutes; provided, that no such parole shall be granted by any such board, without previous notice thereof to the trial judge.<sup>1</sup> [97 v. 488; 66 v. 196.]

(1) **Power to discharge.**—“Good and sufficient cause” must be construed to mean a cause which arises from facts and circumstances which supervene the commitment or did not enter into the conviction or sentence. Such discharge must be

an act of humanity as distinguished from a pardon. *Jiha v. Barry*, 16 Dec. 33; 3 N. P. (N. S.) 65 (aff’d Circuit Court without report).

The power to discharge is only in case sentence was imposed by the municipal court. *Ib.*

**Sec. 2105 R. S. [Officers to have police powers.]** The superintendent, assistant superintendent, and guards of the workhouse shall have such powers of policemen as may be necessary for the proper performance of the duties of their position. [66 v. 196, § 281.]

**Sec. 2106 R. S.** [Infants received where there is no house of refuge.] The council of any corporation owning a work-house, but not owning a house of refuge and correction, shall have power to provide for receiving infants into such work-house, in the manner prescribed in subdivision one of this chapter;<sup>1</sup> and the board of directors of such work-house shall have power to make such rules and regulations in regard to the admission of infants, and their management, as are provided in that subdivision. [66 v. 196, § 282.]

(1) **Statutes referred to.**— Subdivision (1) here referred to means the subdivision relating to houses of refuge. Part of the sec-

tions of this subdivision are re-enacted and found in "(2) Houses of Refuge" *supra*. See note (1) to § 2050 R. S., p. 352.

### (5) *Hospitals.*<sup>1</sup>

**Sec. 2165 R. S.** [Board to control hospital, etc.] The board<sup>2</sup> shall have the entire management and control of such hospital, when the same has been completed and ready for use, and of the furnishing thereof, subject to the ordinances of the council, and shall establish such rules for its government, and the admission of persons to its privileges, as it may deem expedient; and it shall also have power to employ a superintendent, steward, physicians, nurses, and such other employes as it may deem necessary, and fix the compensation of all persons so employed, which compensation shall be subject to the approval of the council.<sup>3</sup> [67 v. 71, § 295.]

(1) **Former provisions** relating to hospitals formed Chap. 3 of Div. 6, Title XII, R. S., §§ 2153 to (2167-21) R. S. Of these, § (2167-3) as amended, 95 O. L. 259, and §§ (2167-7), (2167-8) are repealed.

For sections not re-enacted here and not repealed, see §§ 2153 to 2164 R. S., inclusive, §§ 2166 to (2167-2) R. S., inclusive, §§ (2167-4) to (2167-6) R. S., inclusive, under

CHARITABLE AND REFORMATORY INSTITUTIONS in Part II. §§ (2167-9) to (2167-21) are re-enacted in § 220 of the Code.

**Power to establish hospitals,** see paragraph 16 of § 7 of the Code, page 55.

(2) **Managing board** is now the board of public service (§ 141 of the Code).

(3) Cited *Hauck v. State*, 45 O. S. 439.

### (6) *Infirmaries.*<sup>1</sup>

**Sec. 2168 R. S.** [Management of infirmaries. The management of the affairs of all corporation infirmaries now existing or

which may hereafter be established, and the care of the inmates thereof, the erection and enlargement of infirmary buildings and additions thereto, and the repair and furnishing thereof, the improvement of the grounds therewith connected, and the granting of out-door relief to the poor, shall be vested in a board of three directors, which shall be called "the board of infirmary directors;"<sup>2</sup> provided, that in cities of the second grade of the first class,<sup>3</sup> the board of infirmary directors shall consist of five members, not more than three of whom shall be of the same political party. [1883, March 7; 80 v. 46, 47; 77 v. 16; Rev. Stat. 1880; 72 v. 76, § 298.]

(1) **Former provisions** relating to infirmaries formed Chap. 4 of Div. 6, Title XII R. S., §§ 2168 to (2180-4) R. S. Of these sections, §§ 2170 and (2170-1) R. S., are repealed.

For sections on the subject not re-enacted here, and not repealed, see Part II, CHARITABLE AND REFORMATORY INSTITUTIONS, §§ 2173 to (2180-4) R. S., inclusive.

(2) **Managing board** would now be the board of public service (§ 141 of the Code). Whenever the

word "board" or the word "directors" occurs in this and subsequent sections on this subject, it must be taken to mean the board of public service.

(3) See note "Grades and classes under new Code" under § 1599 R. S., page 31.

**Accounting officer.**—The board of infirmary directors held to be an accounting officer within the meaning of § 7075 R. S. *Hauck v. State*, 45 O. S. 439.

**Sec. 2169 R. S. [Location of pest-houses, etc.]** The infirmary, or the pest-house of the corporation may be located either within or outside of the corporation limits, and the council is authorized to purchase and hold the necessary real estate on which to build the same.<sup>1</sup> [72 v. 76, § 298.]

(1) **Pest house outside corporate limits** can be so located without the consent of the township trustees. *Lorain v. Rolling*, 3 C. C. (N. S.) 660, 24 C. C. 82.

*When a nuisance*, see *Youngstown Township v. Youngstown*, 25 C. C.

518; *Lorain v. Rolling*, 24 C. C. 82.

**Power to establish** pest houses and infirmaries, see paragraph 16 of § 7 of the Code, page 55.

**Power to appropriate** property for, see code § 10, par. 5th, p. 81.

**Sec. 2171 R. S. [To be governed by regulations applicable to hospitals.]** In the management of an infirmary, in the care and treatment of the inmates thereof, and in the erection, enlargement, or repair of any building for infirmary purposes, or of any addition thereto, the directors<sup>1</sup> shall have the same powers, be governed by the same regulations, and perform the same duties, as far as applicable, as are vested in the commis-



sioners of hospitals, as provided in the preceding chapter,<sup>2</sup> and the power of the council in relation to such infirmaries, and the conduct of the directors thereof, shall be the same, so far as applicable, as provided in the chapter in relation to hospitals. [66 v. 200, § 300.]

(1) See note (2) to § 2168 R. S.,  
*supra*.

(2) See note (1) to § 2165 R. S.,  
*supra*.

**Sec. 2172 R. S.** [Their care for the inmates; separation of sexes, etc.] The directors<sup>1</sup> shall further see that the inmates of such infirmary are comfortably provided for and kindly treated; and they may, whenever deemed necessary, provide for the care and support of the males and females in separate buildings, or in separate departments of the same building. [66 v. 200, § 301.]

(1) See note (2) to § 2168 R. S., *supra*.

### (7) *Platting Commission*.<sup>1</sup>

**Sec. 142.** [Board shall constitute platting commission.]<sup>2</sup> The directors of public service shall also constitute a platting commission for the city, whenever council shall deem it expedient to plat any portion of the territory within the corporate limits in which the necessary or convenient streets, or alleys have not already been accepted by the corporation so as to become public streets; and such directors, acting as such platting commission, shall have all the powers and perform all the duties conferred or required in sections 2629, 2630, 2631, 2632, 2633, 2634, 2635 and 2636 of the Revised Statutes of Ohio.

(1) **Former provisions** relating here except §§ 2626, 2627, 2628, to platting commission formed 2637, 2638, and 2639 R. S., which Chap. 12 of Div. 8, Title XII, R. S., are repealed.  
§§ 2626 to 2639 R. S., inclusive. (2) **Old section**.—Compare old All these sections are re-enacted § 2626 R. S., repealed.

**Sec. 2629 R. S.** [To employ engineers, assistants, etc.] The commission<sup>1</sup> shall have power to employ an engineer, and such assistants as they may find necessary, and fix their salaries

within limits to be prescribed by council. [68 v. 36, § 1; 71 v. 116, § 1.]

(1) **Commission** used here and taken to mean the board of public in subsequent sections on the sub- service acting as a platting com- mission ( § 142 of Code).

**Sec. 2630 R. S. [Powers and duties of board.]** It shall be the duty of such commission<sup>1</sup> to cause to be made a plat of the territory which they are ordered to lay out, as soon as the same can be conveniently done, showing the location of the streets and alleys already dedicated, and those proposed; and for the purpose of making the necessary surveys, they shall have power to enter upon all property within the limits of the corporation. [68 v. 36, § 1; 71 v. 116, § 1.]

(1) See note (1) to § 2629 R. S., *supra*.

**Sec. 2631 R. S. [Notice of completion of plans to be published and plans exhibited.]** When the whole plan, or any portion thereof, is completed, or when the location of any avenue, street, roadway, or alley has been finally determined upon by the commission,<sup>1</sup> a plat of the plan, avenue, street, roadway, or alley, shall be placed in the office of the city civil engineer, for the inspection of persons interested, and notice that it is ready for inspection shall be published in one or more newspapers of general circulation within such municipal corporation, for six consecutive weeks.<sup>2</sup> [68 v. 36, § 1; 71 v. 116, § 1.]

(1) See note (1) to § 2629 R. S., *supra*.

(2) **Publication.**—See § 124 of the Code and notes.

**Sec. 2632 R. S. [Commission to hear objections to plans and make alterations.]** During such six weeks the commission<sup>1</sup> shall hold sessions at least once each week, at the time and place stated in the advertisement, and at such other times and places as it may deem proper, to hear any objections that may be urged against any portion of the plat, or the location of any avenue, street, roadway, or alley; and such alterations may be made as the commission shall deem proper. [68 v. 36, § 1; 71 v. 116, § 1.]

(1) See note (1) to § 2629 R. S., *supra*.

**Sec. 2633 R. S.** [Copies of plans to be deposited in county recorder's and city engineer's offices.] At the end of the time aforesaid, the commission<sup>1</sup> shall cause copies of the plat, as finally adopted, to be prepared, and such monuments or marks as it may think proper to be placed on the grounds, and shall deposit one copy, certified to by it, in the office of the county recorder, and another in the office of the city engineer, and such plan shall be deemed and taken to be the regularly adopted plan for streets and alleys in such territory; and no streets or alleys, except those laid down on such plan, shall subsequently be in any way accepted as public streets or alleys by the municipal corporation, nor shall any of the public funds be expended in the improvement or repair of streets or alleys subsequently laid out, and not on such plat: provided, however, that nothing herein shall be construed to prevent any municipal corporation from exercising the power of condemnation, in any of the cases where it is now or may be hereafter by law authorized to condemn and appropriate property to public use, although it be not shown as a street on such plat.<sup>2</sup> [68 v. 36, § 1; 71 v. 116, § 1.]

(1) See note (1) to § 2629 R. S., *supra*. **dedication.**—See notes to § 2650 R. S., re-enacted in § 28 of the

(2) **Common law and statutory** Code, pp. 127, 128.

**Sec. 2634 R. S.** [Acceptance of plan by owner; dedication of streets, etc.] The owners of any portion of the ground so platted may at any time, by a declaration of their intention so to do, properly acknowledged and recorded in the county recorder's office, accept such plan so far as it concerns their property; and such acceptance, or the selling of lots referring to the plan, or the streets and alleys therein laid out, shall be a statutory dedication of the streets and alleys in the property described in the acceptance, or of the streets or alleys called for in the description of the lots so sold, so far as the grantor has a right to dedicate the same.<sup>1</sup> [68 v. 37, § 2.]

(1) **Common law and statutory** R. S., re-enacted in § 28 of the **dedication.**—See notes to § 2650 Code, pp. 127, 128.

**Sec. 2635 R. S.** [Joint commission by adjoining municipal corporations.] When municipal corporations adjoin each other, it shall be lawful for the councils of such municipal corporations to agree, in any manner they may determine, upon the appoint-



ment of a joint commission <sup>1</sup> for the purposes of this chapter; <sup>2</sup> and such commission, when appointed, shall have all the power over the territory of the municipal corporations described in the resolutions of the councils, that is hereby given to a commission appointed by a single council. [68 v. 37, § 3.]

(1) **Joint commission.**—As to whether the provision for appointing a joint commission is consistent with the provisions of the Code giving the powers of a platting com-

mission to the board of public service exclusively, *quere*.

See note (1) to § 2533 R. S., page 73.

(2) See note (1) to § 142 of the Code, *supra*.

**Sec. 2636. [Amendment of plans.]** Plans can be amended after adoption, by like proceedings by which they were originally adopted. [68 v. 37, § 5.]

#### (8) *Contracts by the Board of Public Service.*

**Sec. 143. [As to contracts.]**<sup>1</sup> The directors of public service may make any contract or purchase supplies or material or provide labor for any work under the supervision of that department not involving more than five hundred dollars (\$500).<sup>2</sup> When any expenditure within said department, other than the compensation of persons employed therein, exceeds five hundred dollars, such expenditure shall first be authorized and directed by ordinance of council and when so authorized and directed, the directors of public service shall make a written contract<sup>3</sup> with the lowest and best bidder<sup>4</sup> after advertisement for not less than two nor more than four consecutive weeks<sup>5</sup> in a newspaper of general circulation within the city.<sup>6</sup> The bids shall be opened at 12 o'clock noon, on the last day for filing the same by the clerk of such department of public service and publicly read by him. Each bid shall contain the full name of every person or company interested in the same, and shall be accompanied by a sufficient bond<sup>7</sup> or certified check on some solvent bank, that if the bid is accepted a contract will be entered into and the performance of it properly

secured. If the work bid for embraces both labor and material they shall be separately stated with the price thereof. The board may reject any and all bids.<sup>8</sup> The contract shall be between the corporation and the bidder, and the corporation shall pay the contract price in cash. Where a bonus is offered for completion of contract prior to a specified date, the department may exact a prorated penalty in like sum for every day of delay beyond a specified date. Where there is reason to believe there is collusion or combination among bidders, the bids of those concerned therein, shall be rejected.<sup>9</sup>

[**Alterations or modifications in contract.**] Whenever it becomes necessary in the opinion of the directors of the appropriate department in cities, or of the council in villages, in the prosecution of any work or improvement under contract to make alterations or modifications in such contract, such alterations or modifications shall only be made by such directors in cities or council in villages, by resolution, but such resolution shall be of no effect until the price to be paid for the work and material, or both, under the altered or modified contract, has been agreed upon in writing and signed by the contractor, and the mayor in villages, and the directors of the appropriate department in cities, on behalf of the corporation; and no contractor shall be allowed to recover anything for work or material, caused by any alteration or modification, unless such contract is made as aforesaid; nor shall he, in any case, be allowed, or recover for such work and material, or either, more than the agreed price.<sup>10</sup> The provisions of section 794 of the Revised Statutes of Ohio, so far as the same may apply, shall remain in full force and effect.

(1) **Old sections.**— Among the old sections embodying provisions similar to those in the section above, see § 2303 R. S., repealed; and see §§ 2214 and 2215 R. S., repealed (contracts by board of public service in Cincinnati); 2224 R. S., repealed (changes in such contracts, how made); §§ (1545-73) to (1545-79), all repealed (contracts

in Cleveland); §§ (1545-150) to (1545-155) R. S., and 95 O. L. 266-270, all repealed (contracts in Columbus); § (1707d-9) R. S., repealed (contracts by board of city affairs in Dayton); § (1545-319) R. S., repealed (contracts by board of control in Hamilton); § (1545-249) R. S., repealed (contracts by board of public affairs in Springfield); § (1545-280) R. S., repealed (contracts by board of city commissioners in Youngstown and Akron); and see old §§ 1693 R. S. and 2690j R. S., repealed.

**Delegation of power.**—The power to make public contracts cannot be delegated by one board or officer to another. *Knauss v. Columbus*, 13 Dec. 200.

But allowing engineer to determine engineering matters with regard to bids is not a taking away of powers from the board. The engineer in such case is acting as agent. *Ampt v. Cincinnati*, 17 C. C. 516 (affirmed 60 O. S. 621).

**Municipality's liability on contract.**—There is no implied liability *ex contractu* of a municipality, and it can become obligated only in the manner fixed by statute. *Wellston v. Morgan*, 65 O. S. 219; see also *McCloud v. Columbus*, 54 O. S. 439; *Lancaster v. Miller*, 58 O. S. 558; *Buchanan Bridge Co. v. Campbell*, 60 O. S. 406; *Comstock v. Nelsonville*, 61 O. S. 288. See further note 6, p. 44, and note 2, p. 351.

To state a good cause of action against a municipality in matters *ex contractu* the petition must declare upon a contract, agreement, obligation or appropriation made and entered into according to statute. A petition on an account merely or *quantum meruit*, in such cases is not sufficient. *Wellston v. Morgan*, 65 O. S. 219.

Persons dealing with a municipal corporation must ascertain at their own peril that contract is made in accordance with statute. *Wellston v. Morgan*, 65 O. S. 219.

Where a bidder has received a contract awarded illegally he must be held to have assumed the risks of a decision declaring the award invalid. *Hertenstein v. Herrmann*, 6 N. P. 93.

Where the contract is illegal, the court has no authority to decree payment for the part performed. *Id.*

**Estoppel.**—Where a municipal corporation has entered into a contract with an individual under and by virtue of a statute which is unconstitutional and the subject matter of the contract is not *ultra vires* illegal or *malum prohibitum*, and the facts are such as against the corporation as would estop an individual from setting up as a defense the unconstitutionality of the statute, the municipal corporation will also be so estopped. *Mt. Vernon v. State*, 71 O. S. 428.

So where the municipality has proceeded, not in accordance with the statutes governing its action, but the subject matter is within its power, it may be estopped as an individual would be estopped. *McGonigale v. Defiance*, 15 O. F. D. 100; *Raynolds v. Cleveland*, 8 C. C. (N. S.) 278; but see *Lancaster v. Miller*, 58 O. S. 558.

So contract to supply municipality with water for period of thirty years without vote of the people, when statute required such vote, was held to estop municipality from denying its liability for period during which it has power to contract without a vote of the people. *McGonigale v. Defiance*, 15 O. F. D. 100.

**Form of action.**—A controversy between a municipality and an individual, parties to a contract, as to



their respective rights under the contract, cannot be determined in proceedings in mandamus. *Mt. Vernon v. State*, 71 O. S. 428.

(2) **Contract less than \$500**, for street improvement, may be let to lowest bidder, in discretion of board, but council cannot require such contract to be so let. *State ex rel. v. Roebuck*, 15 Dec. 400.

*Splitting up contract.*—The board cannot split up a contract involving altogether more than \$500 and let it in parts in successive awards, so as to evade the requirements of advertisement, etc. *Wing v. Cleveland*, 15 B. 50; *Lancaster v. Miller*, 58 O. S. 558; but where the board has, in good faith, elected to regard the construction of each section of an improvement as a matter distinct and independent, and has proceeded to contract separately for each section, each involving an expenditure of less than five hundred dollars, advertisements for bids would not be necessary. *Lancaster v. Miller*, 58 O. S. 558.

(3) **Extent of power in making contracts.**—The power conferred upon the board of public service is not simply to execute the contract, but to enter into it; the contract is merely authorized by council; it is made and entered into by the board of public service. *Yaryan v. Toledo*, 28 C. C. 259; 8 C. C. (N. S.) 1.

The board may prepare plans, estimates, etc., for a contract, and this is not the exercise of legislative power and is not conferred on council. *Id.*

The board may properly make the contract for street improvement, though council has only designated in general terms the character of materials and the board is required to choose the particular material to

be used, after bids are received. *Scott v. Hamilton*, 7 C. C. (N. S.) 493.

A contract for part of a system of improvements is not invalidated because the entire system will cost more than council has appropriated. *Yaryan v. Toledo*, 28 C. C. 259; 8 C. C. (N. S.) 1.

(4) **Discretion conferred.**—A power given the board to make a contract "with the lowest and best bidder" confers on such board a discretion to determine which is the lowest and best bidder under all the circumstances, and this discretion cannot be interfered with by the court, in the absence of fraud or gross abuse. *Scott v. Hamilton*, 7 C. C. (N. S.) 493; *State ex rel. Walton v. Herrmann*, 63 O. S. 440; *Coppin v. Herrmann*, 7 N. P. 6 (aff'd 63 O. S. 572); *Hubbard v. Sandusky*, 9 C. C. 638; *McClain v. McKisson*, 15 C. C. 517; *Coppin v. Herrmann*, 6 N. P. 452; *State v. Board of Education*, 6 N. P. 347; *Irwin v. Greenville*, 1 Dayton 140; *Columbus v. Board of P. S.*, 14 Dec. 715.

The board is permitted under this section, to take the best proposition offered, and may take into consideration the quality, efficiency and feasibility of the thing to be furnished, the qualifications and responsibility of the bidder and the price in view of all the other considerations. *Yaryan v. Toledo*, 28 C. C. 259; 8 C. C. (N. S.) 1; *State ex rel. v. Board*, 4 C. C. 76. And it may decide to accept a higher priced article than the one named in the lowest bid, where advertisement was general enough to cover different kinds of material. *State ex rel. v. St. Bernard*, 10 C. C. 74; *State ex rel. v. Bd. of Ed.*, 20 B. 156.

But the discretion is a "sound

discretion,"—a power to make a determination based on facts, after investigation, and not a power to make a merely arbitrary determination. *Coppin v. Herrmann*, 7 N. P. 528.

To authorize a court to interfere on the ground of the insufficiency of the price received for sale of public property, the price must have been so small that the sale amounted to a reckless and improvident act. *Kerlin Bros. v. Toledo*, 20 C. C. 603.

Where board finds that the lowest bidder is not reliable, it may accept the next lowest bid, and court will not interfere with this discretion, although it was not correct on the facts. *State ex rel. v. St. Bernard*, 10 C. C. 74.

But where the best bidder refuses to accept the contract, an award cannot be made to a third party, agreeing to accept it at the same price unless there is a readvertisement, etc. *Franklin v. Baird*, 7 N. P. 571.

As to discretion of public officers in general, in the letting of contracts, see *Boren v. Commr's*, 21 O. S. 311; *State v. Commr's*, 36 O. S. 326; *Pugh Printing Co. v. Deputy State Supervisors, etc.*, 22 C. C. 584; *Wood Co. v. Pargillis*, 10 C. C. 376; *State v. Directors*, 5 O. S. 234; *State v. Commissioners*, 18 O. S. 386, 20 O. S. 425; *State v. Yeatman*, 22 O. S. 546.

Sec. 143 of the Code controls and supersedes § 794 R. S. in considering discretion of board in awarding contract to lowest and best bidder. *Yaryan v. Toledo*, 28 C. C. 259; 8 C. C. (N. S.) 1; and it supersedes § 799 R. S. *Holbrook v. Toledo*, 28

C. C. 284; 8 C. C. (N. S.) 31 (aff'd 73 O. S. 400).

**Remedy of bidder.** — Unsuccessful bidder cannot as such enjoin the awarding of the contract to successful bidder. His only remedy if he can show the contract has been improperly awarded is to sue as a taxpayer. *Carmichael & Co. v. McCourt*, 27 C. C. 775; 6 C. C. (N. S.) 591. See also *Akron v. France*, 24 C. C. 63.

Petition must allege that successful bid was not lowest and best. *Columbus v. Board*, 14 Dec. 715.

**Regularity of bids.**—The bid to be valid must conform to the terms of the advertisement, and if it does not do so, no contract can be awarded on it. *State ex rel. v. Cincinnati*, 1 N. P. 377.

Where advertisement asked for bids for stone for a reservoir and the bid was for stone and grading, an award on such bid is illegal. *Miller v. Pearce*, 2 C. S. C. R. 44.

The officers would have no discretion to amend a bid for alleged mistake, unless the data for such change is apparent on the face of the bid. *Beaver v. Blind Asylum*, 19 O. S. 97; *State ex rel. v. Betts*, 4 C. C. 85; *McGreevy v. Board*, 20 C. C. 114; *State ex rel. v. Cincinnati*, 1 N. P. 377.

But defects in the form of the bid might be waived. *Ross v. Board of Education*, 42 O. S. 374.

Where a bid includes items not called for in the advertisement for bids, and is in a lump sum, it will be taken as a bid for the work called for and no more, and cannot be reduced by estimating the cost of items not mentioned in adver-

tisement. *Boren v. Commr's*, 21 O. S. 311.

Where the advertisement calls for bids for new pipe, a bid for second-hand pipe cannot be accepted. *Lake Shore Foundry v. Cleveland*, 8 C. C. 671.

The bid is not good if it contains a condition. *State ex rel. v. Barnes*, 35 O. S. 136.

But where a bid in response to an advertisement for sale of a natural gas plant, puts a separate price on the part outside the city, the part within and both combined, it is in reality three bids and an award on the first bid will not be invalidated by a condition attached to the last bid. *Kerlin Bros. v. Toledo*, 20 C. C. 603.

A bid cannot be rejected because the granite offered is not from one of five certain quarries, provided the granite offered is equal in quality to the samples as called for in the specifications. *State ex rel. v. Nieman*, 6 N. P. 419.

If a bid fully corresponds with the specifications, the fact that the sample required to accompany it does not come up to the requirement, will not invalidate the bid, for the sample is merely the bidder's interpretation of the requirements. *Many v. Cleveland*, 19 C. C. 58; but see *Herrman v. State*, 11 C. C. 504.

The fact that a foreign corporation has not obtained a license to do business in Ohio, will not make an acceptance of the bid invalid. *Fergus v. Columbus*, 6 N. P. 82.

Provision requires separate statement of price of labor and material when bid embraces both, and this provision is mandatory; and custom of submitting bids otherwise, can-

not override statutory requirement. *Columbus v. Board of Public Service*, 14 Dec. 715.

**(5) Provision mandatory.—**

The requirement of a preliminary advertisement for the benefit of persons to be affected, or for the information of the public, when a public contract is to be let, is mandatory and contract without such advertisement or after advertisement for less than statutory time is void. *Welker v. Potter*, 18 O. S. 85; *Gas & Water Co. v. Elyria*, 57 O. S. 374; *Lancaster v. Miller*, 58 O. S. 558; *Buchanan Bridge Co. v. Campbell*, 60 O. S. 406; *Wing v. Cleveland*, 14 B. 190; *Upington v. Oviatt*, 24 O. S. 232; *McCloud v. Columbus*, 54 O. S. 439.

**Sufficiency of advertisement.**

—Where advertisement omitted certain items of work, but these were given in the specifications (referred to in the advertisement) the advertisement is sufficient. *Ampt v. Cincinnati*, 17 C. C. 516.

Asking for bids in the alternative and providing for alterations, will not invalidate an advertisement for bids. *Ampt v. Cincinnati*, 17 C. C. 516.

The board need not furnish specifications to bidders in any greater detail than is required to make the matter intelligent to persons competent to do the work, where the contract is of the character involved in building an extensive water works plant. *Yaryan v. Toledo*, 28 C. C. 259; 8 C. C. (N. S.) 1.

See further as to sufficiency of advertisement for bids, *Clock Co. v. Commr's*, 31 O. S. 415; *Wing v. Cleveland*, 14 B. 190; *Cincinnati v. Goodman*, 5 Rec. 153.



**What requirements legal.**—A provision in an ordinance that bids shall contain a stipulation that common laborers are to receive at least \$1.50 per day, and have an eight-hour work-day, was held void as violative of constitutional guaranties. *State ex rel. v. Norton*, 5 N. P. 183. See further, *Wheeling Bridge, etc., Co. v. Gilmore*, 8 C. C. 658; *State v. Lake Erie Iron Co.*, 25 B. 101.

A statute providing that stipulations requiring an eight-hour day in work under public contracts, shall be inserted in all such contracts was held unconstitutional, as in conflict with §§ 1 and 19, Art. 1, Const. of Ohio. *Cleveland v. Clements Bros. Co.*, 67 O. S. 197. And when stipulations are contained in a public contract they are of no effect. *Id.*

The advertisement cannot legally require the bidder to specify the manufacturer whose materials he intends to use. *Tucker v. Newark*, 19 C. C. 1.

As to requiring a bidder to procure material from a particular place, such as stone from a particular quarry, see *State ex rel. v. Amlin*, 13 Dec. 335.

As to advertisement calling for use of a patented article, see § 45*b* of the Code, p. 177. See under former statutes, *Holbrook v. Toledo*, 28 C. C. 284; 8 C. C. (N. S.) 31 (aff'd 73 O. S. 400); *Hastings v. Columbus*, 42 O. S. 385.

**Length of advertising.**—Under similar statute, see *Early v. Doe*, 16 How. (U. S.) 10; *Wing v. Cleveland*, 14 B. 190; *Miller v. Pearce*, 2 C. S. C. R. 44; *Gilfillin v. Koke*, 1 W. L. M. 704; *Harmon v. White-*

*more*, 1 B. 109; *Smith v. R. R. Co.*, 8 N. P. 1; *Simmons v. Toledo*, 5 C. C. 124.

(6) **Newspaper** means newspaper printed in the English language, in the absence of provisions to the contrary. *Cincinnati v. Bickett*, 26 O. S. 49.

It may be a newspaper printed only on Sunday. *Hastings v. Columbus*, 42 O. S. 585.

The requirement of publication "in a newspaper" does not forbid additional publications in other papers. This is not a squandering of funds. *Wasem v. Cincinnati*, 2 C. S. C. R. 84.

(7) **Bonds.**—Bidders cannot be required to furnish a written agreement by resident freeholders that they are able to, and will become sureties on the bidder's bond. *Moore v. Cincinnati*, 15 B. 196.

Resident sureties may be required. *Boren v. Comm'rs*, 21 O. S. 311.

Bond cannot be deemed insufficient because the sureties are not on the tax duplicate for a sufficient amount, though in fact worth many times the amount required. *State ex rel. v. Franklin Co.*, 1 C. C. 194.

Where a bond is required to accompany the bid, ability and willingness to give it, if required, are not sufficient. *State v. Comm'rs*, 17 C. C. 370.

The surety on the bond will be presumed to have executed the bond with full knowledge of the terms of the contract and he cannot claim that it covered only a part of the work. *Higgins v. Drucker*, 22 C. C. 112.

(8) **Discretion to reject.**—The right to reject any and all bids confers a discretion that cannot be controlled by the courts, even though exercised arbitrarily or by mistake. *State ex rel. v. Cincinnati*, 3 C. C. 542. See also *Strack v. Ratterman*, 18 C. C. 36.

Where a bidder refuses or fails to enter into the contract awarded him, officers may award it to another bidder. *McClain v. McKisson*, 15 C. C. 517 (affirmed 35 B. 295).

**Reconsideration of rejection.**—After rejection of all bids, council may still reconsider the action and award contract to one of original bidders. *McClain v. McKisson*, 15 C. C. 517 (affirmed 35 B. 295).

But see *State ex rel. v. Cincinnati*, 3 C. C. 542, where it was held that after a rejection by mistake because of supposed irregularities in ordinance and a re-enactment of the ordinance in corrected form, the award could not be made to a bidder under the original ordinance, on his old bid.

**Rescinding contract.**—Where a contract has been awarded and work done and money expended the municipality has no right unreasonably to rescind the contract. *Cincinnati v. Edison Elec. Co.*, 6 N. P. 416.

As to ground for rescission of contract, see further *State v. Niemes*, 6 N. P. 419.

Where the city has unlawfully rescinded the contract it may be required by mandamus to execute

the contract. *State v. Niemes*, 6 N. P. 419.

As to what will amount to a rescission of the contract, see *Railway Co. v. Carthage*, 36 O. S. 631.

**When contract complete.**—At the time of the acceptance of the bid and notice to the bidder the contract between the parties is complete and no additional stipulations can thereafter be inserted in the contract. *Comm'rs v. Rhoades*, 26 O. S. 411.

And the bidder is entitled only to a contract embracing the stipulations, etc., contained in the records up to the time of acceptance. *Hughes v. Clyde*, 41 O. S. 339.

(9) **Combination among bidders.**—An agreement between a bidder who had already filed his bid and a bidder who was about to file his bid, that they should become partners in doing the work if the contract should be awarded to either of them, was held not an unlawful combination among bidders. *Breslin v. Brown*, 24 O. S. 565.

When a contract was obtained by a collusion among bidders it does not follow that the contractor may not recover for performance of the contract, where the city authorities have not rescinded the contract after notice of the collusion, but insisted on performance. *Hubbard v. Norton*, 28 O. S. 116.

(10) **Alterations.**—What changes can be made without new bidding, see *McMakin v. Cincinnati*, 7 N. P. 203; see also *Ampt v. Cincinnati*, 6 N. P. 208 (aff'd 60 O. S. 621).

FORM OF ADVERTISEMENT FOR BIDS.

Legal Notice.

Sealed bids will be received by the Board of Public Service of the city of ..... , State of Ohio, at the office of said board until twelve o'clock noon, ..... , 19...., for furnishing the necessary labor and materials for (here insert general statement of work to be done), according to plans and specifications on file in said office. Each bid must contain the full name of every person or company interested in the same, and be accompanied by a bond in the sum of \$..... to the satisfaction of the board, or a certified check on some solvent bank, as a guaranty that if the bid is accepted, a contract will be entered into and its performance properly secured. Should any bid be rejected such check will be forthwith returned to the bidder, and should any bid be accepted such check will be returned upon the proper execution and securing of the contract.

(If desired add: Bidders are required to use the printed forms, which will be furnished on application.)

The right is reserved to reject any and all bids.

By order of the Board of Public Service.

.....19.... Clerk.

NOTE.—If such an improvement as is referred to in § 794 R. S., *infra*, page 380, costing \$10,000 or more, is to be made, the advertisement for bids must comply with the requirements of that section, and the bid and contract must be made in conformity therewith.

FORM OF BID.

.....19....

The undersigned proposes to furnish all the material and to do all the work necessary in the construction of..... (here state the improvement for which bid is made) according to the plans, specifications and profiles prepared by the city of....., State of Ohio, therefor, and in strict compliance therewith, and under the direction and to the approval of the city engineer (or other proper officer) for the prices following, for materials and labor, respectively, to-wit:

|                                                                | Dollars<br>(In words) | Cents<br>(In words) | Dollars<br>(In figures) | Cents<br>(In figures) |
|----------------------------------------------------------------|-----------------------|---------------------|-------------------------|-----------------------|
| Excavation,<br>per yard.<br>Stone,<br>per perch,<br>etc., etc. |                       |                     |                         |                       |

.....are the only persons or companies interested in this bid.

..... Bidder.



## FORM OF BOND ACCOMPANYING BID.

*Know all men by these presents*, that we....., of....., and....., of....., are held and firmly bound unto the city of....., State of Ohio, in the sum of..... dollars, for the payment of which, well and truly to be made, we hereby jointly and severally bind ourselves, our heirs, successors, executors and administrators.

*The condition of this obligation* is such that if the bid or proposal of ..... for..... (here state work), made this day to the Board of Public Service of the city of..... State of Ohio, is accepted and the contract awarded to the above named bidder, and the said bidder shall within.....days after notice of said award, enter into a contract with the city of....., State of Ohio, for the work bid upon, and shall secure the performance of the same by bond or otherwise as may be prescribed, to the satisfaction of the board of public service of said city, then this obligation shall be null and void; otherwise to be of full force and virtue.

Signed at.....the.....day of....., 19....

.....  
 .....

## FORM OF RESOLUTION ACCEPTING BID.

Be it Resolved, by the Board of Public Service of the city of..... State of Ohio: That the bid of.....for (here state the improvement or work to be done) is the lowest and best bid for said work, that the same be accepted, and that a contract be entered into with said bidder for the same, in the name of the city, upon said bidder giving bond to the satisfaction of this board in the sum of \$.....within..... days from the passage of this resolution; and that the clerk transmit a copy hereof to said bidder.

Adopted....., 19....

Attest:

.....  
 President of Board of Public Service.

.....  
 Clerk.

## FORM OF CONTRACT.

## Articles of Agreement

Between the city of....., party of the first part, and ..... contractor, party of the second part, for..... (here state work contracted for).

This agreement, made and entered into this.....day of....., 19...., by and between the city of....., State of Ohio, party of the first part, and....., contractor, party of the second part:

Witnesseth, That the said party of the second part has agreed and by these presents does agree, with the said party of the first part, for the consideration hereinafter named, to furnish all the materials and do all the work of whatever kind necessary to complete, in a good, substantial and workmanlike manner, ready for use, and in strict accordance with the specifications heretofore prepared therefor, and according to the plans, profiles and drawings on file in the office of the chief engineer (or other officer) of said city, and subject to all the terms and conditions of said specifications, and to the approval of said chief engineer, at the following rates:

|                                                                | Dollars<br>(In words) | Cents<br>(In words) | Dollars<br>(In figures) | Cents<br>(In figures) |
|----------------------------------------------------------------|-----------------------|---------------------|-------------------------|-----------------------|
| Excavation,<br>per yard.<br>Stone,<br>per perch,<br>etc., etc. |                       |                     |                         |                       |

The foregoing rates include all labor and materials. Said party of the second part further expressly covenants and agrees to do everything required to be done by said specifications; and to refrain from everything forbidden by said specifications; that the power reserved to or conferred upon any person or body in said specifications may be exercised by such person or body, and that the right is reserved to the board to order the omission of or addition to any portion of the work or materials called for by the plans and specifications or to make any alterations whatever in the nature of the work or materials called for therein, when made according to law. And said party of the second part further agrees that the amount of compensation to be paid for any additional work shall be at the prices fixed in this contract, if such additional work is of a class provided for in the bid and contract; and in case any portion of the work is omitted, to waive all claims for damages because of such omission and not to demand any pay for the portion of work so omitted.

In case the contractor, party of the second part, shall be required to do any work of a class not provided for in the bid and this contract, said party of the second part agrees that the amount to be allowed him shall be fixed by written agreement between the said contractor and the said board before said work is commenced, and in case of failure to agree, then by the chief engineer of the said city.

The said party of the second part agrees that the said board or said chief engineer may cause any work or materials not in accordance with the specifications and this contract to be taken up, removed and replaced at the expense of the contractor, party of the second part.

The party of the first part agrees and binds itself, upon the completion of the work to the approval of the chief engineer of said city, to pay to the said party of the second part the amount of money due under this agreement. Full payment will be made upon the acceptance of the work or as

soon thereafter as the city treasurer of said city shall place funds at the disposal of the said board.

*In Witness Whereof*, the said city of....., State of Ohio, party of the first part, has caused to be hereunto affixed its corporate name and seal by its Directors of Public Service, in accordance with a resolution duly passed, and the contractor, party of the second part, has hereunto subscribed his name, at....., the day and year aforesaid.

The City of.....

By .....

.....

.....

.....

.....

Directors of Public Service.

[Seal.]

Attest:

.....

Contractor.

.....

Clerk, Board of Public Service.

NOTE.—Instead of full payment upon acceptance of work provision may be made for the payment of a certain percentage upon estimates and the retention of a percentage for a specified time as a guaranty of the quality of the work. Provision may also be made against claims for extras unless ordered in writing by the board at a price agreed upon in advance and against sub-letting the contract or assigning payments due under it. Stipulations may also be made for the dates of beginning and completing the work and power may be reserved by the city to cancel the contract upon violation by the contractor of any of its terms or conditions, and for the completion of the work by the city in such event, at the contractor's expense. Such provisions may be embodied in the specifications, and the latter made a part of the contract.

#### FORM OF BOND FOR COMPLETION OF CONTRACT.

*Know all men by these presents:* That we, ..... principal, and.....and....., sureties, are held and firmly bound unto the city of....., State of Ohio, in the sum of \$....., to be paid to the said city, its successors or assigns, for which payment, well and truly to be made, we hereby bind ourselves, our heirs, successors, executors and administrators, jointly and severally, firmly by these presents.

Signed by us this.....day of....., 19....

*The condition of the above obligation* is such that whereas the said .....has on this.....day of....., 19...., entered into a contract with said city for.....(here state work contracted for), in a manner in said contract and specifications set forth; *Now, Therefore*, if the said.....shall honestly and faithfully discharge and perform all and singular the obligations of said



contract, then this obligation shall be void; otherwise to remain in full force and virtue.

.....  
.....  
.....

FORM OF AFFIDAVIT OF JUSTIFICATION OF SURETY.

State of Ohio }  
..... County, } ss.

.....being duly sworn deposes and says that he is a freeholder in the county of....., State of Ohio, and resides at....., in said county, and that he is worth the sum of \$....., over and above all his debts and liabilities, including his liabilities as bail, surety, or otherwise, and over and above all his property which is exempt by law from execution.

.....  
Subscribed and sworn to before me this.....day of....., 19.....

.....  
Notary Public.

Sec. 794 R. S. [State, county, city, and other officers shall require separate bids for contract work or materials; manner in which contracts shall and shall not be awarded.] When any board of commissioners, board of trustees, officers, or board of directors of the state, or of any county, township, city, town, village, school or road district of the state, or of any public institution belonging to the same, or any common council or other municipal authority, who are now or at any time shall be authorized to contract or engage for the erection, repair, alteration, or rebuilding of any state-house, court-house, penitentiary, jail, infirmary, asylum, poor house, work house, school house, bridge, culvert, or other public building or improvement, and who are now or hereafter may be required by law to advertise for and receive proposals for the furnishing of materials and doing the work necessary for the erection of the same, such officer, board, or other authority, shall require separate and distinct proposals<sup>1</sup> to be made for furnishing the materials or doing the work, or both, in their or his discretion, for each separate and distinct trade or kind of mechanical labor, employment, or business necessary to be used in making such public improvement; and in no case where more than one such trade or kind of mechanical labor, employment or business is required to furnish the materials for, and do any such work, shall any contract for the whole of the job, or any greater portion thereof than is embraced on [in] one trade or kind of mechanical la-

bor, employment or business, be awarded by any such officer, board, or authority, unless the separate bids do not cover all the work and materials required, or the bids for the whole, or for two or more kinds of work or materials are lower than the separate bids in the aggregate; and in all cases the contracts for the doing of the work belonging to each separate trade, or kind of mechanical labor, employment or business, or the furnishing of the materials for the same, or both, at the discretion of said officer or board, or other authority, shall be awarded to the lowest and best separate bidder therefor, and a contract for the same shall, in all cases, be made directly with him or them by said officer, board, or other authority, in the same manner and upon the same terms, conditions, and limitations, as to giving bond,<sup>2</sup> with security and otherwise, as are now prescribed by law, unless the same is let as a whole, or to bidders for more than one kind of work or materials, as aforesaid; but the provisions of this section shall not apply to the erection of buildings and other structures of a less cost than ten thousand dollars. [1888, April 13: 85 v. 218; Rev. Stat. 1880; 74 v. 186, § 1.]

**(1) Separate bids for each distinct part.**—Separate prices for labor and material held not necessary in case of a bid for new pumping machinery. Such a bid could not be thus split up. *Fergus v. Columbus*, 6 N. P. 82, 91.

So of a bid for heating and ventilating systems. *State v. Bd. of Education*, 14 C. C. 15.

Where the contract calls for bids on a number of details of the work, the labor as well as the material to be separately priced on each, and the price of the labor and material combined to be given, the bidder whose total was the lowest is not on that account entitled to the contract for all the items. *State ex rel. v. Commissioners*, 36 B. 176. See further *State v. Commissioners*, 39 O. S. 188.

Section 794 R. S. does not apply where the contract is let for the entire job, under § 799 R. S. *State v. Commissioners*, 39 O. S. 188.

Where the proposals made in compliance with the terms of the advertisement of the official board letting the contract, contain separate bids for furnishing material and doing work for each separate trade or kind of work, though they cover the entire work to be done, are within the terms of section 794, and are

bids not for the work as a whole but for the separate items thereof, and a bidder will not be entitled to a contract for the whole work for the reason that the total of his separate bids covering all the details of the work is less than the total of the separate bids of any other bidder. *State ex rel. v. Hanna*, 13 Dec. 321.

**Joint bids.**—A contract covering work and materials included within two or more of the different trades or mechanical occupations may be awarded to a single bidder bidding jointly upon the same, whenever such joint bid is less than the aggregate of lowest separate bids covering the work and materials included in the same trade or mechanical occupation. *Ib.*

**Contract for whole work** can be awarded to a bidder upon a single bid, only when separate bids do not cover all the trades or mechanical occupations, or where the separate bids covering all the trades whether being as many in number as the different trades or less by reason of joint bids covering two or more trades, being lower than the separate ones, are in the aggregate more than a single bid for the entire job. *Ib.*; see also *Huston v. Franklin*, 15 Dec. 231; 2 N. P. (N. S.) 582.

**Remedy of bidder.**—The only

remedy by which a person making a bid alleged to be the lowest responsible bid, can prevent award of contract to another, is injunction to restrain officials from making such contract, and requiring the matter to be referred back for proceedings according to statute; mandamus will not lie to compel award to plaintiff. *Akron v. France*, 24 C. C. 63, 4 C. C. (N. S.) 496.

Where award is already commenced the only remedy is to enjoin

party to whom contract has been awarded from proceeding further with work, set aside contract and refer matter back to officials for further proceedings. *Ib.*

After work is already completed and paid for, no right of action for damages exists on part of plaintiff claiming to be lowest responsible bidder. *Ib.*

(2) **Bonds of bidders.**—See § 799a R. S. under OFFICERS in Part II.

### **Sec. 143a. [May contract for furnishing of water power.]**

That the directors of the board of public service, of all municipal corporations, by and with the consent of the councils of such municipal corporations, are hereby empowered to enter into and contract with the owners of any hydraulic or other natural or artificial watercourse to furnish water power for the propelling of machinery now or hereafter to be [erected] directed in the waterworks, electric light or gas plants of such municipal corporations, or to acquire by purchase or transfer from others owning such rights, such water power privileges, and for the purpose of carrying into effect such contracts or leases, the said directors of public service may enter into such contracts for any term of years, and the provisions of section 143 and of section 45 of this act herein referred to and to which this is supplemental, shall not apply. [1904, April 25, 97 v. 320.]

**Sec. 144. [How contracts to be made.]**<sup>1</sup> All contracts made by the directors of public service shall be executed by them in the name of the city, and a duplicate copy shall be filed in the office of the department of public service, and a copy with the auditor of the city, and no liability shall be created against the city as to any matters under the supervision of said departments except by its express authority.<sup>2</sup> No resolution or order shall be adopted unless concurred in by a majority of the directors



of public service, and no director of public service or officer or employe of said department shall be interested in any contract under its supervision.<sup>3</sup> The directors of public service shall keep a record of their proceedings, a copy of which, certified by the clerk of the department, shall be competent evidence in all courts.

(1) **Old sections.**—Compare old §§ 2209, 2216, 2217, 2218, 2221 R. S. (repealed).

(2) **Defective contract.**—Where the contract was not made in compliance with law, it is simply void and the court has no authority to

make for the parties the contract that might legally be made. *Chillicothe v. Gas & Fuel Co.*, 8 N. P. 88.

(3) **Officer interested in contract.**—See note (3) to § 45 of the Code, page 176.

*(9) Employees in Department of Public Service.*

**Sec. 145.** [Employment of superintendents, inspectors, clerks, laborers, etc.]<sup>1</sup> The directors of public service may employ such superintendents, inspectors, engineers, harbor masters, clerks, laborers, and other persons, as may be necessary for the execution of the powers and duties of this department, and may establish such subdepartments for the administration of affairs under said directors as may be deemed proper.<sup>2</sup> The compensation and bonds of all persons appointed or employed by the department of public service shall be fixed by said directors, and no person shall be removed except for cause satisfactory to said directors, or a majority of them.<sup>3</sup>

(1) **Old section.**—Compare old § 2211 R. S., repealed.

(2) **Watchmen.**—Under former statutes it was held that such a board as this, having under its care property needing the services of watchmen in addition to the general police patrol, would have the power to employ such watchmen as were necessary. *State ex rel. v. Boyden*, 4 N. P. 322.

(3) **Power of removal.**—Board has exclusive power to remove or

suspend any subordinate officers or employes in its department. § 129 of the Code.

*Delegating power.*—Such a board cannot delegate its power to remove employes. *Kelley v. Cincinnati*, 7 N. P. 360.

*Suspension of employes by subordinate officers.*—Subordinate officers, such as the superintendent of the street cleaning department, who may have a large number of men under him, must have, from the ne-

cessities of the case, power to summarily suspend for insubordination or dereliction of duty. But such suspension can last only until reported to board and acted upon by it. *Kelley v. Cincinnati, supra.*

(C) DEPARTMENT OF PUBLIC SAFETY.

(1) *Organization and general powers.*

**Sec. 146.** [Department of public safety; directors, number, appointment, qualifications, terms, etc.] <sup>1</sup> In every city there shall be a department of public safety, which shall be administered by two or four directors, as council shall, by resolution or ordinance,<sup>2</sup> determine, provided, that when the number of directors has been fixed by council, the same shall not be changed during the term for which any one of said directors has been appointed. The directors of public safety shall be electors of the city, well known for their intelligence and integrity, and shall be appointed by the mayor, with the advice and consent of two-thirds of all the members elected to council,<sup>3</sup> for terms of four years; provided, that if the number of said directors is two, then at the first appointment hereunder, one director shall be appointed for four years, and one for two years; and thereafter as the terms expire, one director shall be appointed for four years; and if the number of said directors is four, then at the first appointment hereunder, two shall be appointed for two years and two for four years, and thereafter as the terms expire two directors shall be appointed for four years, and the mayor shall have power to fill all vacancies for unexpired terms, in like manner as original appointments are made. Not more than half of the number of directors of public safety shall belong to the same political party<sup>4</sup> and in making appointments or filling vacancies the mayor shall preserve this requirement;

[When appointments not made and confirmed within 30 days, governor to appoint.] provided, however, that if said original

appointments are not made and confirmed within thirty days from and after the time herein fixed for said appointments, and, if any vacancy is not filled within thirty days from the date when said vacancy occurs and in the manner herein specified, then and in either such event the governor<sup>5</sup> of the state of Ohio shall make said original appointments or fill such vacancy in the manner provided herein.

[**Bonds; compensation; organization.**] The bonds and compensation of the directors of public safety shall be fixed by council.<sup>6</sup> The directors shall organize as a board, which shall be known as the "board of public safety." One of their number shall be chosen each year to act as president, and it shall require a majority of the members to constitute a quorum or to pass any measure or authorize any act.

(1) **Old sections.**— Compare old §§ (1545-40) R. S. (Director of Police, Cleveland); (1545-48) R. S. (Director of Fire Service, Cleveland); (1545-134) R. S. (Director of Public Safety, Columbus); (1545-208) R. S. (Police and Fire Board, Springfield); (1545-270), (1545-275) R. S. Board of City Commissioners, Akron and Youngstown); (1545-296) R. S. (Department of Police, and Department of Public Safety, Hamilton); §§ 1870 and 2436 R. S. (Police Commissioners and Fire Trustees, Cincinnati), all repealed.

(2) **Form of resolution or ordinance,** fixing or changing the number of directors of public safety; see that given under § 117 of the Code, page 307.

**Constitutionality** of provision authorizing councils to determine number of directors of public safety, see *Zumstein v. Mullen et al.*, 48 B., 177, 67 O. S. 382.

(3) **Consent of council** to appointment must be manifested by

some affirmative act and not mere acquiescence. *State ex rel. v. Darby*, 12 C. C. 235 (aff'd 52 O. S. 611).

(4) **Political qualification.**— See *State ex rel. v. Ratterman*, 58 O. S. 731.

(5) **Appointment by governor.**

— Validity of act authorizing appointment of police board by governor upheld in *State v. Covington*, 29 O. S., 102; *State v. Baughman*, 38 O. S., 455. But see *State ex rel. Knisely et al. v. Jones et al.*, 66 O. S. 453, where a special act on this subject was held void, and where the question as to whether such appointments by the governor violate the principles of local self-government or involve the conferring upon the governor of powers which he is not competent to receive and exercise, is raised but not determined. See also *State ex rel. v. Comm'rs*, 54 O. S. 333.

(6) **Form of ordinance** fixing salaries and bonds; see that given under § 227 of the Code.



**Sec. 147. [General powers and duties.]**<sup>1</sup> All powers and duties connected with and incident to the appointment, regulation and government of the police and fire departments of the city, together with the control of the fire alarm telegraph and telephone systems shall be vested in the mayor and the board of public safety as hereinafter provided. The mayor shall be the chief conservator of the peace within the limits of the corporation. The directors of public safety shall make all contracts with reference to the management of the police and fire department, subject to the restrictions hereinafter imposed.<sup>2</sup>

(1) **Old sections** relating to police boards and officers were formerly contained in Chap. 5, Div. 5, Title XII., R. S., §§ 1870 to (2030-23) R. S., all repealed. And see note (1) under § 146, *supra*.

Old sections relating to the fire department were formerly contained in Chap. 2, Div. 8, Title XII., R. S., §§ 2436 to (2477-91) R. S. all repealed, except §§ 2470 R. S. and 2471 to 2475 R. S., inclusive, which are re-enacted in the Code

sections relating to villages. (See § 207 of the Code.)

(2) **Contracts.**— See § 154, *infra*, page 391.

**Employing attorney.**— It was held, under former statutes, that the board having charge of police department may employ such counsel as it may select, when necessary to preserve or secure the fund entrusted to its control. *Yaple v. Commissioners*, 2 C. C. 406, *aff'd* 25 B., 336.

**Sec. 148. [Police department; emergency policemen.]** The chief of police shall be the executive head of the department, under the direction of the mayor; provided, that the chief shall have exclusive control of the stationing and transfer of all patrolmen and other officers and employes in the department, under such general rules and regulations as may be prescribed by the board of public safety; and provided, further, that in case of riot or other like emergency, the mayor shall have power to appoint additional patrolmen and officers for temporary service (who need not be in the classified list of such department), the number of which shall be first determined by resolution of the board of public safety, but the length of

time for which such additional officers or patrolmen shall be employed shall be limited to the time during which such emergency may exist.

**Sec. 149. [Police department.]**<sup>1</sup> The police department of each city shall be composed of a chief of police and such inspectors, captains, lieutenants, sergeants, corporals, detectives, patrolmen, and other police court officers, station house keepers, drivers, and substitutes as shall have been provided by ordinance or resolution of council.

The directors of public safety shall have the exclusive management and control of all other officers, surgeons, secretaries, clerks and employes as shall have been provided by ordinance or resolution of council.

The directors of public safety may commission private policemen who may not be in the classified list of said department under such rules and regulations as council shall prescribe.

The chief of police shall be appointed from the classified list of such department.<sup>2</sup>

(1) **Organizing police and fire departments.**—The new Code requires the councils to fix the number, salaries and bonds of all officers and other members of the police and fire departments, and the departments so established are to be classified for appointments therein by the board of public safety. (§§ 149, 150 and 153 of the Code.) The police department must consist of a chief of police, and such inspectors, captains, lieutenants, sergeants, corporals, detectives, patrolmen, police court officers, station house keepers, drivers and substitutes as council determines in its ordinance. The fire department must consist of a chief of the fire department, and such marshals, as-

sistant marshals, firemen, telephone and telegraph operators as council determines in its ordinance. Forms for these two ordinances are given hereunder and under § 150 *infra*.

Council may also provide for other officers, surgeons, secretaries, clerks and employes under the board of public safety, and fix their salaries and bonds. §§ 149 and 150 of the Code. Whether or not these latter positions are also to be regarded as within either the police or fire departments proper and a part of the classified service is not clear. (See §§ 149, 150, 153, 158, 162 and 167 of the Code.) It is certain that no officer, secretary or other employe serving in the police or fire department of any

city at the time of the passage of the new Code can be removed or reduced in rank or pay, except in accordance with the provisions of the Code, whether his position, under the new organization, be within the classified service or not. See further, note under § 167 of the Code, *infra*.

(2) **Appointment of Chief.**—By the words “classified list” is meant the register prescribed by Section 164. State *ex rel.* v. Wyman, 49 B. 496.  
See, as to right to appoint superintendent of police under old department as chief of police under new code, notes under Section 167 *infra*.

FORM OF ORDINANCE ORGANIZING POLICE DEPARTMENT.  
Ordinance No.....

Fixing the number, salaries and bonds of members of the police department.  
Be it ordained by the council of the city of.....,  
State of Ohio:

Sec. 1. That the police department of the city of..... shall be composed of the following officers and other members, who shall receive the respective salaries hereinafter provided, payable..... out of the police fund of the city, and shall give the respective bonds hereinafter required:

- 1. A chief of police, who shall receive \$.....per annum, and shall give bond in the sum of \$.....
- 2. ....inspectors of police, etc.
- 3. ....captains, etc.
- 4. ....lieutenants, etc.
- 5. ....sergeants, etc.
- 6. ....corporals, etc.
- 7. ....detectives, etc.
- 8. ....patrolmen, etc.

(Enumerating such force as is desired by council.)

Sec. 2. The police department as constituted herein shall be classified, for appointments thereto, by the board of public safety, as required by law.

Sec. 3. This ordinance shall take effect and be in force from and after the earliest period allowed by law, but shall not affect the tenure of office or employment or the rank or pay of any officer, secretary, clerk, sergeant, patrolman, or other employe now serving in the police department of this city.

Passed.....19.....  
.....  
Attest: ..... President of Council.  
.....  
Clerk.

NOTE.—An ordinance providing for other officers, surgeons, secretaries, clerks, etc., under the board of public safety, as authorized by the second paragraph of § 149 of the Code, may be adapted from the above.

**Sec. 150.** [Fire department; emergency firemen.] The chief of the fire department shall be the executive head of the department, under the direction of the mayor; provided, that the chief shall have exclusive control of the stationing and trans-



ferring of all firemen and other officers and employes in the department, under such general rules and regulations as may be prescribed by the board of public safety; and provided further that in case of riot or other like emergency the mayor shall have power to appoint additional firemen and officers for temporary service (who need not be in the classified list of such department), the number of which shall be first determined by resolution of the board of public safety, but the length of time for which such additional officers or firemen shall be employed shall be limited to the time during which such emergency may exist. The fire department of each city shall be composed of a chief of the fire department and such marshals, assistant marshals, firemen, telephone and telegraph operators as shall have been provided by resolution or ordinance of council. The directors of public safety shall have the exclusive management and control of such other officers, surgeons, secretaries, clerks, and employes as shall have been provided by ordinance or resolution of council.

The chief of the fire department shall be appointed from the classified list of such department.

#### FORM OF ORDINANCE ORGANIZING FIRE DEPARTMENT.

Ordinance No. —.

Fixing the number, salaries and bonds of members of the Fire Department.

Be it ordained by the Council of the city of.....,  
State of Ohio:

Section 1. That the fire department of the city of..... shall be composed of the following officers and other members, who shall receive the respective salaries hereinafter provided, payable....., out of the fire fund of the city, and shall give the respective bonds hereinafter required:

1. A chief of the fire department, who shall receive \$..... per annum, and shall give bond in the sum of \$.....

2. .... Marshals, etc.

3. .... Assistant marshals, etc.

4. .... Firemen, etc.

5. .... Telephone and telegraph operators, etc.

(Enumerating such force as is desired by council.)

Section 2. The fire department as constituted herein shall be classified, for appointments thereto, by the Board of Public Safety, as required by law.

Section 3. This ordinance shall take effect and be in force from and after the earliest period allowed by law, but shall not affect the tenure of office or employment or the rank or pay of any officer, secretary, clerk, or other employe now serving in the fire department of this city.

Passed....., 19....

Attest:

.....

Clerk.

.....,

President of Council.

NOTE.—An ordinance providing for other officers, surgeons, secretaries, clerks, etc., under the Board of Public Safety, as authorized by the last sentence of the first paragraph of § 150 of the Code, may be adapted from the above.

**Sec. 151. [General duties of police and fire departments.]** The police force shall preserve the peace, protect persons and property and obey and enforce all ordinances of council and all criminal laws of the state and the United States. The fire department shall protect the lives and property of the people, in case of fire, and both the police and fire departments shall perform such other duties, not inconsistent herewith, as council may by ordinance prescribe.<sup>1</sup> The police and fire departments in every city shall be maintained upon the merit system, as provided in this act.

(1) **Municipal power.**—The police department of a municipality derives its authority from the state; and when such municipality is not expressly or by necessary implication authorized to do so, it can neither enlarge nor restrict the duties of such department or its officers as defined by the legislature. *Cleveland v. Payne*, 72 O. S. 347.

**Municipal liability.**—The power to establish and control a fire department is governmental in its nature, and a municipality is not liable for damages resulting from its failure to provide agencies for extinguishing fires, or for negligence of the employes or officers in the fire department. *Wheeler v. Cincinnati*, 19 O. S. 19; *Frederick v.*

*Columbus*, 58 O. S. 538; *Cincinnati v. Cameron*, 33 O. S. 336; *Dayton v. Pease*, 4 O. S. 80, 97-99; *Thomas v. Findlay*, 6 C. C. 241; see also *Blunk v. Dennison Co.*, 71 O. S. 250.

Fire department is not subject to a speed ordinance. *Toledo Ry. & L. Co. v. Ward*, 25 C. C. 399 (aff'd 71 O. S. 492).

Likewise, the power to establish a police department and regulate the police, is governmental, and municipality is not liable for failure to provide sufficient police protection, or for the negligence of police officers. *Western College v. Cleveland*, 12 O. S. 375; *Robinson v. Greenville*, 42 O. S. 625; *Alvord v. Richmond*, 3 N. P. 136.

**Sec. 152. [Power of chief of police and chief of fire department as to suspension of deputies, officers or employes.]**<sup>1</sup> The chief of

the police and the chief of the fire department shall have exclusive right to suspend any of the deputies, officers or employes in his respective department and under his management and control, for incompetence, gross neglect of duty, gross immorality, habitual drunkenness, failure to obey orders given him by the proper authority, or for any other reasonable and just cause.<sup>2</sup>

[**Procedure thereupon.**] If any such employe be suspended as herein provided, the said chief of police or the chief of the fire department, as the case may be, shall forthwith in writing, certify such fact, together with the cause of such suspension, to the mayor, who shall within five days from the receipt of the same, proceed to inquire into the cause of such suspension and render his judgment thereon and his judgment in the matter shall be final, except as otherwise provided in this act.

[**Power of mayor as to suspension of chief of police or chief of fire department.**] The mayor shall have the exclusive right to suspend the chief of the police department or the chief of the fire department for incompetence, gross neglect of duty, gross immorality, habitual drunkenness, failure to obey orders given him by the proper authority or for any other reasonable and just cause.<sup>3</sup> In the event that either the said chief of police or chief of the fire department shall be suspended as herein provided it shall be the duty of the mayor to forthwith certify such fact, together with the cause of such suspension, to the board of public safety, which shall within five days from and after the date of the receipt of such notice proceed to hear said charges and render its judgment thereon, which shall be final.

(1) **Old section.**—Compare old § 1749 R. S., giving the mayor power to suspend any lieutenant of police or any officer appointed by the mayor.

(2) **Power.**—Even where an off-



er is not expressly given power to suspend subordinates, he may have, from necessity, implied power to suspend for a reasonable time. *Kelley v. Cincinnati*, 7 N. P. 360.

Where city has failed to provide necessary funds, this is a valid ground for suspension of member of fire department. *Osborne v. Columbus*, 15 Dec. 561; 3 N. P. (N. S.) 1.

**Effect of act of reviewing board.**—Where the reviewing board disapproves the suspension the vacancy created by the suspension is thereby terminated and the person appointed to fill the vacancy, ceases to be an officer. *State v. Heinmiller*, 38 O. S. 101.

**Effect on wages.**—A policeman suspended for cause is not entitled to wages during the time of suspension, even though the cause was afterwards declared insufficient by the authority reviewing. *Steuben-*

*ville v. Culp*, 38 O. S. 18; *State v. Heinmiller*, 38 O. S. 101.

A member of fire department wrongfully suspended may not sit quietly by without performing any service or taking action to have himself reinstated, and hold city liable for his compensation. *Osborne v. Columbus*, 15 Dec. 561; 3 N. P. (N. S.) 1.

**Majority decision** is sufficient. *State ex rel. v. Barrett*, 22 C. C. 104.

**Board equally divided.**—Where an officer is suspended, and his suspension reported to the trial board for approval, if the board is equally divided the officer is entitled to resume work. *Kelley v. Cincinnati*, 7 N. P. 360.

(3) **Power of mayor.**—The power of the mayor to suspend is limited to the statutory causes for suspension. He has no implied power to suspend. *State ex rel. v. Bryson*, 44 O. S. 457, 469.

**Sec. 153. [Classification of service in police and fire department.]** The directors of public safety shall classify the service in the police and fire departments in conformity with the ordinance of council determining the number of persons to be employed therein, and shall make all rules for the regulation and discipline of such departments and for the qualification and examination of all appointees thereunder, except as otherwise provided in this act.<sup>1</sup>

(1) **Rules.**—A rule of the fire department forbidding an officer to assign his salary or to incur indebtedness which he is unable to pay, was held not unreasonable. *State v. Hyman*, 22 C. C. 213; so also a rule requiring an officer not to be guilty of conduct unbecoming an

officer and a gentleman or prejudicial to the good order of the department. *Ib.*

**Fines.**—Whether fines can be assessed against a policeman as a means of enforcing discipline, see *Kinney v. Toledo*, 1 N. P. 374.

**Sec. 154. [Contracts relative to police or fire department.]** The directors of public safety shall have power to make all contracts and expenditures of money for acquiring lands for the erection or repairing of station houses, and for the erection and building of all station houses, police stations, fire department buildings, fire cisterns, and plugs that may be required, and for the purchase of engines, apparatus, and all other supplies necessary for the police and fire departments;

provided, that no obligation involving an expenditure of more than five hundred dollars shall be created except upon the approval of the city council and by written contract which shall be awarded to the lowest and best bidder after advertising for ten days in a newspaper of general circulation in the city. They shall make no sale or disposition of any property belonging to the city without first being authorized by resolution or ordinance of the city council.<sup>1</sup> [1904, April 25, 97 v. 388.]

(1) **Contracts and sales.**—See municipal property, see §§ 24, 25, notes to § 143 of the Code, p. 371 26 and 27 of the Code.  
*et seq.* As to sales or lease of

(2) *Police, Fire and Sanitary Police Pension Funds.*

**Sec. 155.** [Relief of members of police or fire department disabled in the discharge of their duty.] Council may provide by general ordinance for the relief out of the police or fire funds, of members of either department temporarily or permanently disabled in the discharge of their duty; but nothing herein contained shall be held to impair, restrict or repeal any portion of the act passed April 23, 1902, entitled, "An act authorizing the levy of taxes in municipalities to provide for firemen's, police and sanitary police pension funds, and to create and perpetuate boards of trustees for the administration of such funds."<sup>1</sup>

(1) **Power of legislature to change pension laws.**—Under former pension laws it was held within the power of the legislature to change or wholly abolish pensions to disabled firemen. *Price v. Farley*, 22 C. C. 48.

**Special acts** creating a school teachers' pension fund limited in operation to certain school districts were held unconstitutional. *State ex rel. v. Hubbard*, 22 C. C. 252, aff'd, 65 O. S., 574.

[An act authorizing the levy of taxes in municipalities to provide for firemen's, police and sanitary police pension or relief funds, and to create and perpetuate boards of trustees for the administration of such funds.]

[Sec. 1.] (a) [Trustees of the firemen's pension fund.] In any municipal corporation in this state having, or which may here-

after have, a fire department supported in whole or in part at the public expense, the council, board of legislation or other legislative body may, by ordinance, declare the necessity for the establishment and maintenance of a firemen's pension fund for the purpose hereinafter enumerated; and thereupon there shall be created a board of trustees in the manner herein provided, who shall be known as the "trustees of the firemen's pension fund," and who shall administer and distribute the fund authorized to be raised by this section.

(b) [**How board chosen; tie vote.**] The board of trustees of the firemen's pension fund shall consist of the members of the board of public safety or other officer having charge or control of the fire department in any municipal corporation availing itself of the provisions of this section, and five other persons, members of the department of such municipal corporation, to be chosen as follows: The board of public safety or other board or officer having charge or control of the fire department shall give notice of an election to be held on the second Monday of the month following the determination of said board or officer to create a firemen's pension fund under the authority of this section; said notice shall be by posting the same in a conspicuous place at the headquarters of said department, and at the houses of the several companies composing the same; each person in the fire department, who, by its rules, is designated as a member thereof, shall, between the hours of nine o'clock in the forenoon and six o'clock in the afternoon on the day designated, send or cause to be sent, by mail or otherwise, in writing, the name of five persons, members of such department, who shall be the choice of the member so voting; and all votes so cast shall be counted and canvassed by the board or officer having charge or control of the said fire department, who shall announce the result, and the five members of the fire department receiving the highest number of votes shall become members of the board of trustees of the firemen's pension fund for the ensuing year. In case of a tie vote being received by any two members persons for the office of trustee, such tie vote shall be decided by casting lots, or in any other way which may be agreed upon by the persons for whom such tie vote was cast.

[**Term of members; vacancy.**] The members so elected shall serve for one year or until their successors are elected, and the election for such members of the board of trustees shall be held annually upon the second Monday of the same month upon which the first election occurs. In case of a vacancy by



death, resignation or otherwise among the five members so elected the remaining member or members so elected shall choose the successor or successors until the next annual election; provided, that upon the petition of a majority of the members of the fire department in any such municipality, the board or officer having charge or control of said department may designate a less number than five members of said department to be elected trustees of said firemen's pension fund.

**[Officers of board.]** The presiding officer of the board of public safety or other board having charge or control of the fire department, or the officer in charge or control of said department, shall be president of the board of trustees of the firemen's pension fund created under this section, and the secretary, clerk or corresponding officer of the fire department shall be secretary of such board of trustees of the firemen's pension fund, and in case there be no secretary, clerk or corresponding officer of said fire department, the board of trustees of the firemen's pension fund shall appoint the secretary of their board. It shall be the duty of such secretary to keep a full record of all the proceedings of the board of trustees of the firemen's pension fund, and said trustees may fix his compensation for this work, which shall be paid out of said pension fund.

(c) **[Firemen's pension fund; how created.]** In every municipality availing itself of the provisions of this section, there shall be a firemen's pension fund, which shall be maintained as follows: The council, board of legislation, or other legislative body of such municipality, are hereby authorized to levy annually at the time and in the manner provided by law for other municipal levies, and in addition to all the other levies authorized by law, a tax of not more than three-tenths of a mill on each dollar upon all the real and personal property as listed for taxation in such municipality, and in the manner of such levy the board of trustees of the firemen's pension fund shall be subject to all the provisions of law controlling the heads of departments in any such municipality, and shall fulfill all the duties required of such heads of departments; provided, that a failure of such board of trustees to act in the manner required by law of the heads of departments in any such municipalities in the making of such levy, shall not limit the power of the council, board of legislation or legislative body to make said levy; and provided further that in case the council, board of legislation or other legislative body, shall fail in any year to make the maximum levy herein authorized, then and in that event, there shall, in addition to the amount

realized therefrom, be passed to the credit of the firemen's pension fund such portion of the tax raised under an act of the general assembly, passed May 14, 1886, and as amended, March 26, 1888, April 28, 1890, and February 20, 1896, and entitled "An act providing against the evils resulting from the traffic in intoxicating liquors," required in said act to be passed to the credit of the general fund in any such municipality, as will equal, when added to the amount realized from said levy, the amount that would be realized from a three-tenths of a mill levy on each dollar upon all the real and personal property as listed for taxation in such municipality, or such part thereof as shall be necessary to meet the pension payroll; provided that such portion so used of the tax raised under said act of the general assembly aforesaid shall not exceed sixteen-thirtieths of the amount of said tax required in such sections to be passed to the credit of the general fund in any such municipality. All fines imposed upon any member of the fire department in any such municipality by way of discipline or punishment by the board or officer having charge or control of said department, and all proceeds of suits for penalties for the violation of any statute of this state, or ordinance of such municipality, with the execution of which the fire department is charged, and license or other fees payable under the same, shall be credited to said pension fund; and the board of trustees of said fund are authorized to take by gift, grant, devise or bequest, any moneys or real or personal property, upon such terms as to the investment or expenditure thereof as may be fixed by the grantor or determined by said trustees. The trustees of the firemen's pension fund may also receive such uniform amounts from each person designated by the rules of the fire department a member thereof as he may voluntarily agree to, to be deducted from the monthly pay of said person, and the monthly amounts so received shall be used as a fund to increase the pension which may be granted to such persons or their beneficiaries.<sup>1</sup>

**(1) Enforced contributions invalid.**—Under a special school teachers' pension act, it was held that deductions from salaries to support the fund, made without consent of the teachers, is forbidden by § 2, Art. 12, and the bill

of rights of the Const. of Ohio. *State ex rel. v. Hubbard*, 22 C. C. 252, (aff'd, 65 O. S., 574) and teachers accepting positions after notice of such deductions, are not estopped to attack validity of law. *Ib.*

(d) [**Who custodian of fund; bond.**] The treasurer of every municipality having a firemen's pension fund shall be the custodian of said fund and shall pay out the same upon the proper order of the board of trustees. Said treasurer shall execute a bond for the faithful performance of his duties with respect to this fund, and in such sum and form as shall be satisfactory to said board of trustees.

(e) [**How fund invested.**] The board of trustees of said pension fund may invest any moneys received by them other than those raised by taxation under this section, in interest bearing bonds of the United States, of the state of Ohio, or of any county, township, school district or municipal corporation in this state. Said board of trustees shall make a report to the council, board of legislation or other legislative body of the municipality of the condition of said fund on the first day of January of each year.

(f) [**Rules and regulations.**] The board of trustees of the firemen's pension fund shall make all rules and regulations for the distribution of said fund, including the qualifications of those to whom any portion of said fund shall be paid, and the amount thereof; provided, that no such rules and regulations shall be in force until the same have been approved by the board of public safety, or other board or officer having charge or control of the fire department in any such municipality.

(g) [**Who beneficiaries of fund.**] All persons drawing pensions or entitled to the same from existing firemen's pension funds, are hereby made beneficiaries in any pension funds created under this section in the same municipality where said persons are beneficiaries in said existing pension funds, and shall remain such, receiving such amounts and subject to the rules and regulations adopted by the board of trustees of said firemen's pension fund as aforesaid.

[**Upon organization board shall become successor of similar board now existing in any municipality.**] Upon the organization of any board of trustees of a firemen's pension fund created under this section, all moneys, credits, investments and property of every kind and description held by existing firemen's pension boards in any municipality where new board are organized under this section, shall by said existing boards be delivered, transferred and conveyed to said new boards, and the said new boards created under this section are hereby made the successors of the existing boards as to the ownership of all such property. [95 v. 223; 1904, April 23, 97 v. 242.]



[Sec. 2.] (a) [Trustees of the police relief fund.] In any municipal corporation in this state having, or which may hereafter have, a police department supported in whole or in part at the public expense, the council, board of legislation or other legislative body may, by ordinance, declare the necessity for the establishment and maintenance of a police relief fund for the purposes hereinafter enumerated; and thereupon there shall be created a board of trustees in the manner herein provided, who shall be known as the "trustees of the police relief fund," and who shall administer and distribute the fund authorized to be raised by this section.

(b) [How board made up; tie vote.] The board of trustees of the police relief department shall consist of the members of the board of public safety, police commissioners or other board or officer having charge or control of the police department in any municipal corporation avail itself of the provisions of this section, and five other persons, members of the police department of such municipal corporation, to be chosen as follows: The board of public safety, police commissioners or other board or officers having charge or control of the police department, shall give notice of an election to be held on the second Monday of the month following the determination of said police commissioners or other board or officer to create a police relief fund under the authority of this section; said notice shall be posted by the same in a conspicuous place at the headquarters of said department and at various station houses within the municipality; each person in the police department, who, by its rules, is designated a member thereof, shall, between the hours of nine o'clock in the forenoon and six o'clock in the afternoon, on the day designated, send or cause to be sent by mail or otherwise, in writing, the names of five persons, members of such department, who shall be the choice of the members so voting; and all votes so cast shall be counted and canvassed by the board of public safety, police commissioners or other board or officer having charge or control of the said police department who shall announce the result, and the five members of the police department receiving the highest number of votes shall become members of the board of trustees of the police relief fund for the ensuing year. In case of a tie vote being received by any two persons for the office of trustee, such tie vote shall be decided by casting lots, or in any other way which may be agreed upon by the persons for whom such tie vote was cast.

**[Term of members; vacancies.]** The members so elected shall serve for one year and until their successors are elected, and the election for such members of the board of trustees shall be held annually upon the second Monday of the same month upon which the first election occurs. In case of a vacancy by death, resignation or otherwise among the five members so elected, the remaining member or members so elected shall choose the successor or successors until the next annual election; provided, that upon the petition of a majority of the members of the police department in any such municipality, the board of public safety, police commissioners or other board or officer having charge or control of said department to be elected trustees of said police relief fund.

**[Officers of board.]** The presiding officer of the board of public safety, police commissioners or other board having charge or control of the police department, or the officer in charge or control of said department, shall be the president of the board of trustees of the police relief fund created under this section, and the secretary, clerk or corresponding officer of the police department shall be secretary of said board of trustees of the police relief fund, and in case there be no secretary, clerk or corresponding officer of said police department, the board of trustees of the police relief fund shall appoint the secretary of their board. It shall be the duty of such secretary to keep a full record of all the proceedings of the board of trustees of the police relief fund, and said trustees may fix his compensation for this work, which shall be paid out of said relief fund.

(c) **[Police relief fund; how created.]** In every municipality availing itself of the provisions of this section there shall be a police relief fund, which shall be maintained as follows: The council, board of legislation or other legislative body of such municipality are hereby authorized to levy annually at the time and in the manner provided by law for other municipal levies, and in addition to all other levies authorized by law, a tax of not more than three-tenths of a mill on each dollar upon all the real and personal property as listed for taxation in such municipality, and in the matter of such levy the board of trustees of the police relief fund shall be subject to all the provisions of law controlling the heads of departments in any such municipality, and shall fulfill all the duties required of such heads of departments; provided that the failure of such board of trustees to act in the manner required by law of the heads of departments in any such municipality in the making of such levy, shall not limit the power of the council,

board of legislation, or other legislative bodies, to make said levy; and provided, further, that in case the council, board of legislation or other legislative body, shall fail in any year to make the maximum levy herein authorized, then and in that event, there shall, in addition to the amount realized therefrom, be passed to the credit of the police relief fund such portion of the tax raised under an act, entitled "An act providing against the evils resulting from the traffic in intoxicating liquors" passed May 14, 1886, and as amended March 26, 1888, and April 28, 1890, and February 20, 1896 and required by said act to be passed to the credit of the general fund in any municipality, as will equal, when added to the amount realized from said levy, the amount that would be realized from a three-tenths of a mill levy on each dollar upon all the real and personal property as listed for taxation in such municipality, or such part thereof as shall be necessary to meet the pension pay-roll; provided, that such portion so used of the tax raised by said act, shall not exceed thirteen-thirtieths of the amount of said tax required in said sections to be passed to the credit of the general fund in any such municipality.

All fines imposed upon any member of the police department in any such municipality by way of discipline or punishment, by the police commissioners or other board or officers having charge or control of said department, all rewards, fees or proceeds of gifts and emoluments that may be allowed by the police commissioners or other board or officer having charge or control of said police department, to be paid and given for or on account of any extraordinary service of any member of the force, and all moneys arising from the sale of unclaimed property or money, after deducting all expenses incident thereto, shall be credited to said police relief fund; and the board of trustees are authorized to take by gift, grant, devise or bequest, any moneys or real or personal property, upon such terms as to the investment or expenditure thereof as may be fixed by the grantor or determined by said trustees. The trustees of the police relief fund may also receive such uniform amounts from each person designated by the rules of the police department a member thereof, as he may voluntarily agree to, to be deducted from the monthly pay of said person, and the monthly amounts so received shall be used as a fund to increase the pensions which may be granted to such persons or their beneficiaries, or in the discretion of the board of trustees of the police relief fund, the money derived from such monthly deductions may be used to relieve members of the force who contribute thereto, when sick



or disabled from the performance of duty, for funeral expenses, relief of their families in case of death or for pensions when honorably retired from the force.<sup>1</sup>

(d) [**Who custodian of fund; bond.**] The treasurer of every municipality having a police relief fund shall be the custodian of said fund, and shall pay the same upon the proper order of the board of trustees. Said treasurer shall execute a bond for the faithful performance of his duties with respect to this fund, and in such sum and form as will be satisfactory to said board of trustees.

(e) [**Investment of fund.**] The board of trustees of said police relief fund may invest any moneys received by them other than those raised by taxation under this section in interest bearing bonds of the United States, of the state of Ohio, or of any county, township, school district or municipal corporation in this state. Said board of trustees shall make a report to the council, board of legislation or other legislative body of the municipality of the condition of said fund on the first day of January of each year.

(f) [**Rules and regulations.**] The board of trustees of the police relief fund shall make all rules and regulations for the distribution of said fund, including the qualifications of those to whom any portion of said fund shall be paid, and the amount thereof; provided, that no such rules and regulations shall be in force until the same have been approved by the board of public safety police commissioners or other board or officer having charge or control of the police department in any such municipality.

(g) [**Who beneficiaries of fund.**] All persons drawing pensions or enjoying or entitled to the same or other relief from existing police [relief] or pension funds are hereby made beneficiaries in any police relief funds created under this section in the same municipality where the same persons are beneficiaries in said existing police pension or relief funds, and shall remain such, receiving such amounts and subject to the rules and regulations adopted by the board of trustees of said police relief fund as aforesaid.

[**Upon organization board shall become successor of similar board now existing in any municipality.**] Upon the organization of any board of trustees of a police relief fund created under this section, all moneys, credits, investments and property of every kind and description held by existing police pension or relief boards in any municipality where new boards are organized under this section, shall by said existing boards be de-

livered, transferred and conveyed to said new boards, and the said new boards created under this section are hereby made the successors of the existing boards as to the ownership of all such property. [95 v. 223; 1904, April 23, 97 v. 245.]

**[Sec. 3.] (a) [Trustees of the sanitary police pension fund.]**

In any municipal corporation in this state, having or which may hereafter have, a sanitary police force, supported in whole or in part at the public expense, the council, board of legislation or other legislative body may, by ordinance, declare the necessity for the establishment and maintenance of a sanitary police pension fund for the purposes hereinafter enumerated; and thereupon there shall be created a board of trustees, in the manner herein provided, who shall be known as the "trustees of the sanitary police pension fund," and who shall administer and distribute the fund authorized to be raised by this section.

(b) **[How board chosen; tie vote.]** The board of trustees of the sanitary police pension fund shall consist of the board or officer having charge or control of the health department in any municipal corporation availing itself of the provisions of this section, and five other persons, members of the sanitary police force of such corporation, to be chosen as follows: The board or officer having charge or control of the health department shall give notice of an election to be held on the second Monday of the month following the determination of said board or officer to create a sanitary police pension fund under the authority of this section; said notice shall be by posting the same in a conspicuous place at the headquarters of said force; each person in the sanitary police force, who, by its rules, is designated a member thereof shall, between the hours of nine o'clock in the forenoon and six o'clock in the afternoon on the day designated, send or cause to be sent, by mail or otherwise, in writing, the names of five persons, members of such sanitary police force, who shall be the choice of the member so voting; and all votes so cast shall be counted and canvassed by the board or officer having charge or control of the said health department, who shall announce the result, and the five members of the sanitary police force receiving the highest number of votes shall become members of the board of trustees of the sanitary police pension fund for the ensuing year. In case of a tie vote being received by any two persons for the office of trustee, such tie vote shall be decided by casting lots, or in any other way which may be agreed upon by the persons for whom such tie vote was cast.

**[Term of members; vacancies.]** The members so elected shall serve for one year and until their successors are elected, and the election for such members of the board of trustees shall be held annually upon the second Monday of the same month upon which the first election occurs. In case of a vacancy by death, resignation or otherwise among the five members so elected, the remaining member or members so elected shall choose the successors until the next annual election; provided, that upon the petition of a majority of the members of the sanitary police force in any such municipality, the board or officer having charge or control of the health department may designate a less number than five members of said sanitary police force to be elected trustees of said sanitary police pension fund.

**[Officers of board.]** The presiding officer of the board having charge or control of the health department, or the officer in charge or control of said health department, shall be president of the board of trustees of the sanitary police pension fund created under this section, and the secretary, clerk, or corresponding officer of the health department shall be secretary of the board of trustees of the sanitary police pension fund, and in case there be no secretary, clerk, or corresponding officer of said health department, the board of trustees of the sanitary police pension fund shall appoint the secretary of their board. It shall be the duty of such secretary to keep a full record of all the proceedings of the board of trustees of the sanitary police pension fund, and said trustees may fix his compensation for this work, which shall be paid out of said pension fund.

(c) **[Sanitary police pension fund; how created.]** In every municipality availing itself of the provisions of this section there shall be a sanitary police pension fund, which shall be maintained as follows: The council, board of legislation, or other legislative body of such municipality, are hereby authorized to levy annually, at the time and in the manner provided by law for other municipal levies, and in addition to all other levies authorized by law, a tax not exceeding one-thirtieth of a mill on each dollar upon all the real and personal property as listed for taxation in such municipality, and in the matter of such levy the board of trustees of the sanitary police pension fund shall be subject to all the provisions of law controlling the heads of departments in any such municipality, and shall fulfill all the duties required of such heads of departments; provided, that a failure of such board of trustees to act in the manner required by law of the heads of depart-



ments in any such municipality in the making of such levy, shall not limit the power of the council, board of legislation or other legislative body to make said levy; and provided further, that in case the council, board of legislation or other legislative body, shall fail in any year to make the maximum levy herein authorized, then and in that event there shall, in addition to the amount realized therefrom, be passed to the credit of the sanitary police pension fund such portion of the tax raised under an act passed and amended as aforesaid, required in said act to be passed to the credit of the general fund in any such municipality, as will equal, when added to the amount realized from said levy, the amount that would be realized from a one-sixtieth of a mill levy on each dollar upon all the real and personal property as listed for taxation in such municipality, or such part thereof as shall be necessary to meet the pension pay-roll; provided, that such portion so used, of the tax raised under said sections 4364-9 to 4364-17 inclusive, shall not exceed one-thirtieth of the amount of said tax required in such sections to be passed to the credit of the general fund in any such municipality. All fines imposed upon any member of the sanitary police force in any such municipality by way of discipline or punishment by the board or officer having charge of the health department, and all proceeds of suits for penalties for the violation of any statute of this state, or ordinances of such municipality, with the execution of which the health department is charged, and license or other fees payable under the same, shall be credited to said pension fund; and the board of trustees of said fund are authorized to take by gift, grant, devise or bequest, any moneys or personal property, upon such terms as to the investment or expenditure thereof, as may be fixed by the grantor or determined by said trustees. The trustees of the sanitary police pension fund may also receive such uniform amounts from each person designated by the rules of the sanitary police force a member thereof, as he may voluntarily agree to, to be deducted from the monthly pay of said person, and the monthly amounts so received shall be used as a fund to increase the pension which may be granted to such persons or their beneficiaries.<sup>1</sup>

(1) See note under § 1 (c) of this act, page 395.

(d) [Who custodian of fund; bond.] The treasurer of every municipality having a sanitary police pension fund shall be the custodian of said fund and shall pay out the same upon the proper order of the board of trustees. Said treasurer shall execute a bond for the faithful performance of his duties with

respect to this fund, and in such sum and form as shall be satisfactory to said board of trustees.

(e) **[Investment of funds.]** The board of trustees of said sanitary police pension fund may invest any moneys received by them other than those received by taxation under this section, in interest bearing bonds of the United States, or of the state of Ohio, or of any county, township, school district or municipal corporation in this state. Said board of trustees shall make a report to the council, board of legislation or other legislative body of the municipality of the condition of said fund on the first day of January of each year.

(f) **[Rules and regulations.]** The board of trustees of the sanitary police pension fund shall make all rules and regulations for the distribution of said fund, including the qualifications of those to whom any portion of said fund shall be paid and the amount thereof; provided, that no such rules and regulations shall be in force until the same have been approved by the board or officer having charge or control of the health department in any such municipality.

(g) **[Who beneficiaries of fund.]** All persons drawing pensions or entitled to the same from existing sanitary police pension funds, are hereby made beneficiaries in any pension funds created under this section in the same municipality where said persons are beneficiaries in said existing pension funds, and shall remain such, receiving such amounts and subject to such rules as govern the distribution of said existing sanitary police pension funds.

**[Upon organization board shall become successor of similar board now existing in any municipality.]** Upon the organization of any board of trustees of a sanitary police pension fund, created under this section, all moneys, credits, investments and property of every kind and description held by existing sanitary police pension boards in any municipality where new boards are organized under this section, shall by said existing boards be delivered, transferred and conveyed to said new boards, and the said new boards created under this section are hereby made the successors of the existing boards as to the ownership of all such property. [95 v. 223; 1904, April 23, 97 v. 248.]

*(3) Merit System in Police and Fire Departments.*

**Sec. 156. [In what cases mayor to prefer charges against a director of public safety; duty of council thereupon.]** The board of public safety shall enforce and administer the merit system as provided in this act. It is hereby made the duty of the

mayor to prefer charges with council against any director of public safety for incompetence, neglect of duty, malfeasance in office, habitual drunkenness or gross immorality;<sup>1</sup> and any manifest failure on the part of any director of public safety to enforce the provisions of this act according to its true intent and purpose shall be deemed incompetence. Upon such charges being filed with the council it shall be the duty of council to proceed to inquire into said charges in the manner provided in this act for the removal of other officers of the municipality.<sup>2</sup>

(1) **Statutory causes for removal exclusive.**—The causes for removal provided by statute exclude all other causes. *Dorgan v. Columbus*, 12 Dec. 121; *State v. Ganson*, 58 O. S. 313.

See, for other causes of removal of directors, § 225 of the Code.

**Definitions.**—Misconduct in office means as such officer and not otherwise. *Graham v. Stein*, 18 C. C. 770.

Where an officer commits an offense for which he may be indicted, but which does not touch his particular character as such officer, he ought not to be removed until he has been indicted and convicted criminally. *Graham v. Stein*, 18 C. C. 770; *State v. Chapman*, 11 O. 430.

Incompetency in a legal sense means a lack of fitness to discharge the duties of the position, and official delinquency or corruption

would be a disqualification rendering an officer incompetent. *State v. Fire Commissioners*, 26 O. S. 24.

Misconduct implies wantonness and not honest mistakes. *State ex rel. v. Roll*, 7 W. L. J. 121.

**Charges.**—A charge setting out facts showing that the officer cursed the board and refused to come to order, would amount to a charge of "misconduct in office." *State ex rel. v. Sutton*, 4 B. 608.

It is not necessary that the word "incompetency" be used in the charge, when this is the ground, if acts evidencing incompetency, are shown. *State v. Fire Commissioners*, 26 O. S. 24. As to definiteness of charges, etc., see notes under § 225 of the Code.

(2) **Proceeding.**—See § 225 of Code. And see generally for matters relating to nature of power of removal, etc., notes thereunder.

**Sec. 157. [Members of the board of public safety not to hold other office; oath.]** No member of said board of public safety shall hold any other lucrative office or employment under the United States, the state of Ohio, county, or any municipal corporation or political division thereof,<sup>1</sup> and shall, before en-



tering upon the discharge of his duty, take the oath prescribed by the constitution of the state.<sup>2</sup>

(1) **Holding other office.**—Compare § 120 of the Code, and see note (2) thereunder, page 176.

(2) **Oath.**—See §§ 1737 and 1740 R. S., re-enacted in § 224 of the Code and see notes to these sections.

**Sec. 158.** [Classification of offices, places of appointment and employment.] The board of public safety shall within thirty days after the organization of such board, classify all offices and places of appointment and employment in each city in the department of public safety, with reference to the examinations hereinafter provided for. The offices, employment and places so classified by the said board of public safety shall constitute the classified service of the department of said city and no appointments to such places shall be made except under and according to the rules hereinafter mentioned.

[**Information to be furnished to mayor.**] Immediately upon the classification of such department, such board shall furnish to the mayor a list of all offices, employment and places in any way connected with such department within said classified service, with the names of the incumbents, their compensation and the nature of their duties; and said board shall from time to time promptly furnish to the said mayor in writing at his request all other information desired by him for the proper fulfillment of his duties.

**Sec. 159.** [**Application for examination.**] Every application, in order to entitle the applicant to appear for examination or to be examined, must state in his or her own handwriting the facts, under oath, on the following subjects:

- 1st. Full name, residence and postoffice address.
- 2d. Nationality.
- 3d. Age.
- 4th. Place of birth.
- 5th. Health and physical capacity for public service.

6th. Previous employment in public service.

7th. Business or employment, and residence for the previous five years.

8th. Education.

9th. Such other information as may be reasonably required by said board touching the applicant's fitness for public service.

**Sec. 160. [Who not to be appointed or retained in office.]**

No person habitually using intoxicating beverages to excess shall be appointed to or retained in any office, appointment or employment, to which the provisions of the merit system as provided in this act are applicable; nor shall any vendor of intoxicating liquors be so appointed or retained.

No person shall be appointed to any office, place or employment to which the provisions of the merit system as contained in this act are applicable within one year after his conviction of any offense against the laws of this state; and if any person holding such appointment shall be convicted of the violation of any such law he shall be immediately discharged.

No person shall be eligible for appointment unless he be a citizen of the state of Ohio and of the city in which such appointment is made, and shall have been a resident of such city for at least one year prior to the time of such appointment.

**Sec. 161. [Rules and regulations.]** Said board of public safety shall make all proper and necessary rules to carry out the purposes of the merit system as contained in this act, and for examinations, appointments, promotions and removals in accordance with its provisions.<sup>1</sup>

One of the said rules shall provide that any personal solicitation to any officer or member of said board or to the appointing power, in favor of any candidate by any person whomsoever, unless fraudulently done in order to injure him, shall be taken to be, and deemed to have been done at the instance

of the candidate himself and shall disqualify him from competing at any examination for appointment for, and during the term of one year thereafter.

Said board may from time to time make changes in the original rules, and all examinations shall be under the direction of said board, and all rules and all changes therein shall forthwith be printed for distribution by said board, and the board shall give notice of the time and place where said rules may be obtained by publication in a newspaper in such city or of general circulation therein, and in each of such publications there shall be specified the date, not less than ten days subsequent to the date of such publication, when said rules shall go into operation.

(1) **Enforcement of rules.**— C. C. 213; State *ex rel.* v. Barrett, Courts will not review testimony 22 C. C. 104; State *ex rel.* Hussey taken in trial for infractions of v. Hyman, 21 C. C. 187. rules. State *ex rel.* v. Hyman, 22

**Sec. 162. [Examination of applicants for office or places of appointment.]** All applicants for offices or places of employment in such classified service shall be subjected to examination, which shall be competitive and free to all citizens of the United States, with specified limitations as to residence, health, habits and moral character herein provided; provided that no educational test shall be made of an applicant other than that actually required for the particular position for which he applies. Such examinations shall be practical in character and relate to those matters which will fairly test the relative capacity of the persons examined to discharge the duties of the positions to which they seek to be appointed, and shall include tests of physical qualifications and health and where appropriate, of manual skill.

No question in any examination shall relate to political or religious opinions or affiliations.



**Sec. 163. [Publication of notice of examination.]** Notice of the time and place and general scope of every examination shall be given by said board by publication once each week for two weeks preceding such examination, in at least two daily newspapers of opposite politics published in such city or of general circulation therein, if such there be, and such notice shall be posted by said board in a conspicuous place in the office of the mayor, the clerk of the city council, and of said board, two weeks before such examination; such further notice of examinations may be given as is by the board prescribed.

**Sec. 164. [Register of names of persons eligible to appointment.]** From the results of the examinations made by said board; said board shall prepare a register, for each grade or class of positions in the classified service of such city, of the names of the persons whose general average standing upon such examination for such grade is not less than the minimum fixed by the rules of said board and where otherwise eligible; and such persons shall take rank upon the register as candidates, in the order of their relative examinations, as determined by examination, without reference to priority of the time of examination.

**Sec. 165. [Promotion; examination for promotion.]** The board shall, by its rules, provide for promotions in the classified service, on the basis of ascertained merit, and seniority in service, and on examination, and shall provide in all cases where it is practicable, that vacancies shall be filled by promotion. Examinations for promotion may be competitive or non-competitive as the board may determine, among members of the next lower rank, and it shall be the duty of the board to submit to the mayor the names of not more than three applicants having the highest rating, for each promotion.

The method of examination and the rules governing the same, and the method of certifying shall be the same as provided

for applicants for original appointment; or such examinations may be non-competitive as provided by this section.

**Sec. 166. [Method of appointment.]** The mayor shall notify said board of any vacancy which may exist in the classified department of such city, and said board shall certify to said mayor the names and addresses of the three candidates standing highest upon the register, for the class or grade to which said position belongs. The mayor shall notify said commission of each position to be filled, separately, and the mayor shall fill such place by appointment of one of the persons certified to him by said board, which appointment shall be on probation for such length of time as shall be fixed by the rules of said board; such board may strike off names of candidates from the register after they have remained thereon for more than two years.<sup>1</sup>

At or before the expiration of the period of probation, the mayor of the city in which the candidate is employed or has been appointed, may, by and with the consent of said board, discharge him upon giving in writing to said board his reason therefor. If at the end of such period of probation such person has not been discharged his appointment shall be deemed complete.

**[Temporary appointments.]** To prevent the stoppage of public business or to meet extraordinary exigencies, as provided in this act, the mayor may make temporary appointments.

(1) **Filling vacancies.** — The provision as to examination does not apply to men who were in office when the code went into effect. State *ex rel. v. Hall*, 2 C. C. (N. S.) 237, 25 C. C. 361. Code § 213, relating to retention of all officers until their successors are chosen is controlled, as to police and fire

departments, by special provisions in the code for those departments. *Ib.*

**Certifying names.** — Whether mandamus will lie to compel board to certify names to mayor, *quere.* State *ex rel. v. Hall*, 2 C. C. (N. S.) 237, 25 C. C. 361.

**Sec. 167. [No removal or discharge except for cause.]** No officer or employe in the department of public safety shall be removed or discharged except for cause; and the cause of removal of any person shall be forthwith stated in writing by the mayor to the board, and shall be filed by the said board in its office, and shall be open to public inspection.

No officer, secretary, clerk, sergeant, patrolman, fireman or other employe serving in the police or fire departments of any city of the state at the time this act goes into effect shall be removed or reduced in rank or pay except in accordance with the provisions of this act.<sup>1</sup>

(1) **Constitutionality.**—The latter part of this section was held not in contravention of section 27, article 22 of the Constitution. *State ex rel. v. Hall*, 2 C. C. (N. S.) 237, 25 C. C. 361; *contra*, *Bender v. Cushing*, 14 Dec. 65.

**Reorganization under new code.**—The intention of the legislature was, not that every member of the police and fire department in every municipality when the code went into effect should remain in office when the new department was established by ordinance, but that when the new department was established and the number of places provided, those places should be filled from among the members of the department. The places under the new department might be less than under the old. *State ex rel. Hall*, 2 C. C. (N. S.) 237, 25 C. C. 361, and the new reorganization must be made to fit, so far as possible, the conditions existing under the old charter or law under which the former departments were

organized, for the purpose of preserving the personnel of the departments and the standing of the members composing them. *State ex rel. v. Stroble*, 2 C. C. (N. S.) 293; 25 C. C. 762. A superintendent of police, being the chief of police under the former law, would be the one chosen chief of police under the new Code. *Ib.*

While the legislature intended that officers and employes already in the department at the time of reorganization under the new Code should, so far as possible, not be disturbed, yet it did not intend that a vacancy in any office in the department could be filled only from the list of incumbents of offices and employments. *State ex rel. v. Wyman*, 71 O. S. 1.

**Term of appointees.**—An appointment made, the employment "to cease at the pleasure of the board," held contrary to the spirit and letter of first clause of section 167. *Bender v. Cushing*, 14 Dec. 65.



**Sec. 168. [Mayor to give notice of appointment, resignations, vacancies, etc.]** Immediate notice in writing shall be given by the mayor to said board, of all permanent appointments in such department, and of all promotions, resignations or vacancies from any cause, in such department, and of the date thereof, and a record of the same shall be kept by said board.

**Sec. 169. [Investigation of enforcement of merit system.]** The mayor, or any one appointed by him, shall investigate the enforcement of the merit system, as provided in this act, and all the rules prescribed by the board of public safety, and the conduct and action of the appointees in such department, and may inquire as to the nature, tenure and compensation of all offices or places in the public service thereof. In the course of such investigation, the mayor or such appointee shall have power to administer oaths and said mayor or appointee shall have power to secure by subpoena both the attendance and testimony of witnesses and the production of books and papers relevant to such investigation; such subpoena shall be served by any officer authorized to serve civil process.

**Sec. 170. [Report of the board to mayor.]** Said board of public safety, shall, at the time provided for the making of reports by municipal officers to the mayor, make and deliver to the mayor, and to council, a report showing the rules in force in such department, the practical effects thereof and any suggestions it may approve for the more effectual accomplishment of the purposes of said department. The mayor, or council may require a report from said board of public safety at any other time.

**Sec. 171. [Clerk of board; duties.]** The clerk of the board of public safety shall keep the minutes of its proceedings, preserve all reports made to it and made by it, keep a record of all

examinations held under its direction, and perform such other duties as the board of public safety shall prescribe.

**Sec. 172. [Offenses in connection with merit system.]** No person or officer shall wilfully or corruptly, by himself or in cooperation with one or more persons, defeat, deceive or obstruct any person, with respect to his right to examination, or falsely or corruptly mark, grade or estimate or report upon the examination or proper standing of any person examined hereunder, or aid in so doing, or wilfully or corruptly make any false representation concerning the same or concerning the person examined, or wilfully or corruptly furnish to any person any special or secret information for the purpose of either improving or injuring the prospects or chances of any person so examined or to be examined, or to be appointed, employed or promoted; or wilfully impersonate any other person or permit or aid, in any manner, any other person to impersonate him in connection with any examination or registration or application, or request to be examined or registered, or who shall make known or assist in making known to any applicant for examination, in advance of such examination, any question to be asked on such examination shall for each offense be deemed guilty of a misdemeanor.

**Sec. 173. [Bribery.]** No applicant for appointment in said department, either directly or indirectly, shall pay or promise to pay any money or other valuable thing to any person whomsoever, for or on account of his appointment or proposed appointment, and no officer or employe shall pay or promise to pay either directly or indirectly to any person any money or valuable thing whatsoever for or on account of his promotion.

**Sec. 174. [Recommendations for appointment or promotion.]** No applicants for appointment or promotion in said department shall ask for or receive a recommendation or assistance from

any officer or employe in said department or any other department of the city government, or from any person, upon the consideration of any political service rendered or to be rendered to or for any such person, or for the promotion of such person to any office or appointment.

**Sec. 175. [Political assessments and contributions.]** No person shall solicit orally or by letter, or be in any manner concerned in soliciting any assessment, contribution or payment for any party or any political purpose whatsoever from any officer or employe who is included within the department of public safety of the city government of any such city.

**Sec. 176. [Political assessments and contributions.]** No person shall in any room or building occupied for the discharge of the official duties of any officer or employe in the department of public safety of any city, solicit orally or by written communication, delivered therein, or in any other manner, or receive therein any contribution of money or other thing of value for any party or political purpose whatsoever. No officer, agent, clerk or employe in the government of such city who may have charge of or control of any building, office or room occupied by the department of public safety or any branch thereof, for any such purpose, shall permit any person to enter the same for the purpose of therein soliciting or delivering written or oral solicitations or receiving or giving notice of any political assessments.

**Sec. 177. [Political assessments and contributions.]** No officer or employe in the department of public safety shall directly or indirectly give or hand over to any officer or employe in said department or to any officer, or employe in said service or to any public official or other person whomsoever any money or other valuable thing on account of or to be applied to the promotion of any party or political object whatever.



**Sec. 178. [Political assessments and contributions.]** No officer or employe in the classified service of any city shall discharge, degrade or promote or in any manner change the official rank or compensation of any officer or employe in the department of public safety or promise or threaten to do so on account of such officer or employe withholding or neglecting to make any contribution of money or other valuable thing to any party or political purpose, or for refusal or neglect to render any party or political service.

**Sec. 179. [Corrupt use of political authority or influence.]** No person while holding any office in the department of public safety or while seeking nomination therefor, or election thereto, or appointment to any such office, shall corruptly use or promise to use, either directly or indirectly, any official authority or influence (whether then possessed or merely anticipated) in the way of conferring upon any person or in order to secure or aid any person in securing any office or public employment, or any nomination, confirmation, promotion or increase of salary upon the consideration or condition that the vote or political influence or action of the last named person or any other, shall be given or used in behalf of any candidate, officer, or party, or upon any other corrupt condition or consideration.

**Sec. 180. [Auditor shall not allow claims for services of persons employed in violation of this act.]** No clerk, auditor or accounting officer of any city shall allow the claim of any public officer for services of any deputy or other person employed in the department of public safety in violation of the provisions of this act.

**Sec. 181. [Mayor's certification to auditor of appointments and vacancies.]** The mayor shall certify to the auditor all appointments to offices and places in the department of public safety

of such city, and all vacancies occurring therein, whether by dismissal, removal, resignation or death, and the date thereof.

**Sec. 182. [Refusal to obey subpoena.]** Any person who shall be served with subpoena to appear and testify or to produce books and papers, which subpoena has been issued by the mayor or by any person appointed by or acting under his control, in the course of an investigation conducted under the provisions of section 169 of this act, and who shall refuse or neglect to appear or testify, or to produce books and papers relevant to said investigation as noted in such subpoena shall be guilty of a misdemeanor, and shall, on conviction, be punished as provided in section 183 of this act.

**[Witness' fees and mileage.]** The fees for witnesses for attendance and travel shall be the same fees as witnesses receive before the court of common pleas of this state, which fees and the fees of the officer serving such witnesses shall be paid from the appropriation for the expenses of said department.

**[Procedure for compelling attendance of witnesses; perjury.]** The court of common pleas of the county in which such city is situate, or any judge of said court, either in term time or vacation, upon application of the mayor, or his appointee, may, in his or their discretion, compel the attendance of witnesses, the production of books and papers and the giving of testimony before such mayor or appointee, by attachment for contempt or otherwise, in the same manner as the production of evidence may be compelled before said court. Every person, who, having taken oath or made affirmation before said mayor, or his appointee conducting an examination and authorized to administer oaths, shall wilfully swear or affirm, corruptly or falsely, shall be guilty of perjury, and upon conviction shall be punished accordingly.

**Sec. 183. [Penalty for violation of this act relating to the merit system.]** Any person who shall wilfully or through culp-

able negligence, violate any of the provisions of this act, relating to the merit system in the department of public safety, or of any rule promulgated in accordance with the provisions thereof, shall be guilty of a misdemeanor, and shall, on conviction thereof, be fined in a sum of not less than fifty dollars and not exceeding one thousand dollars, or be imprisoned in the county jail for a term not exceeding six months, or both, in the discretion of the court.

**Sec. 184. [Conviction under preceding section shall work forfeiture of office and disqualification to hold.]** If any person shall be convicted under the next preceding section, any public office or place of public employment which such person may hold, shall by force of such conviction be rendered vacant, and such person shall be incapable of holding any office or place of public employment in such city for the period of five years from the date of such conviction.

**Sec. 185. [Prosecutions, who to institute.]** Prosecutions for violations of the merit system, as contained in this act, shall be instituted by the prosecuting attorney of the county in which the offense is alleged to have been committed, by the city solicitor, or by the mayor, acting through special counsel, employed by him, and said suits shall be conducted and directed by the prosecuting officers who institute them unless they request the aid of other prosecuting officers.

**Sec. 186. [Right of person removed by the mayor to appeal to board of public safety.]** Any person in the department of public safety in any city who shall be removed from his position of employment or appointment, by the mayor, shall have the right to appeal from the decision of such officer, to the board of public safety within ten days from and after the date of his removal, and said board of public safety shall hear said appeal within ten days from and after the filing of the same with it, and its judgment in the matter shall be final.<sup>1</sup>



(1) **Trial and removal.**—The action of the proper tribunal for the removal of a police officer was, under former statutes, held final so far as the question of the truth of the charges is concerned. *State ex rel. v. Barrett*, 22 C. C. 104; *State ex rel. v. Hyman*, 22 C. C. 213; *State ex rel. Hussey v. Hyman*, 21 C. C. 187.

As to definiteness of charges, see *State ex rel. v. Barrett*, 22 C. C. 104.

**Proceedings in trial.**—Decision

by majority of trial board is sufficient. *State ex rel. v. Barrett*, 22 C. C. 104.

A finding "from the evidence and also from facts within personal knowledge" is not a proper exercise of power, unless the facts are shown and an opportunity to refute them given. *State v. Sullivan*, 58 O. S. 504.

**Nature of power of removal, remedies, etc.**—See notes to § 225 of the Code.

#### (D) BOARD OF HEALTH.<sup>1</sup>

**Sec. 187. [Board of health; appointment, etc.; when board of public service may be.]**<sup>2</sup> The council of each city and village shall establish a board of health;<sup>3</sup> such board shall be composed of five members to be appointed by the mayor and confirmed by the council who shall serve without compensation and a majority of whom shall constitute a quorum; provided, that whenever the council of any city shall declare by ordinance that it will be for the best interests of said city that the board of public service act as a board of health for the city, then upon the passage of said ordinance the board of public service of said city shall be the duly authorized board of health thereof and shall have all the powers and perform all the duties prescribed by law for boards of health; and the mayor shall be president by virtue of his office. In villages the council may appoint a health officer instead of a board of health and fix his salary and term of office, such appointee to be approved by the state board of health, who shall have all the powers and perform all the duties granted to or imposed upon boards of health, except that all rules, regulations or orders of a general character and required to be published, made by such health officer, shall be approved by the state board of health.

**[In what cases state board of health may appoint health officer.]**

And if any city, village or township fails or refuses to establish a board of health or appoint a health officer, the state board

of health may appoint a health officer for such city, village or township and fix his salary and term of office, and such health officer shall have the same powers and duties as health officers appointed in villages in lieu of a board of health, as herein provided, and the salary of such health officer, as fixed by the state board of health, and all necessary expenses incurred by him in performing the duties of a board of health shall be paid by and be a valid claim against the city, village or township for which such health officer is appointed to serve. [1904, April 26, 97 v. 460.]

(1) **Board of health statutes re-enacted by the Code.**—The laws on the subject of boards of health formerly comprised Chap. 1, Div. 6, Title XII. of Bates' Revised Statutes, §§ 2113 to 2148-9, inclusive. This entire chapter was redrafted by the Legislature on May 7, 1902, and all the sections therein (except 2122-1, referring to garbage crematory in Columbus; 2131a, referring to sanitary police in Cleveland; 2132a, providing rules in certain cities; 2134-1, 2134-2 and 2134-3, regulating sale of ice; 2141-1, abolishing board in certain villages; 2142a, 2142b, 2142c, 2142d and 2142e, providing for sanitary plants; 2142e-1 to 2142e-7, inclusive, authorizing sanitary boards in certain cities; and 2148-1 to 2148-9, inclusive, establishing a sanitary police pension fund in Cleveland), were repealed, and new sections substituted, numbered from 2113 to 2148, without regard to the particular subject matter of the old sections. (95 O. L. 421). The new Code, in § 189, *infra*, re-enacts all these sections, as thus amended and renumbered, except 2113, 2114, 2117 and 2133. Of these, 2113 and 2133 are repealed by the Code; 2114 is re-enacted as later amended May 12, 1902 (95 O. L. 643), and 2117 is neither re-enacted nor expressly repealed. §§ 2115 and 2128 were again amended in 1904 and 2122 was

again amended in 1906. This edition of the Code, therefore, contains, under § 189, §§ 2115 to 2148 R. S., inclusive, as amended May 7, 1902, (2115, 2122, 2128 being given as last amended) and § 2114 as amended May 12, 1902. For sections carried in Part II. see next succeeding note.

**Board of health statutes in Part II.**—Under BOARD OF HEALTH in Part II. will be found all sections of the Revised Statutes on this subject not re-enacted in § 189 of the Code, or not expressly repealed by the Code, except §§ 2148-1 to 2148-9, inclusive, which established a sanitary police pension fund in Cleveland, and which are now superseded by the general act on police, fire and sanitary police pension funds, re-enacted in §§ 155 of the Code. The sections thus carried in Part II. are as follows: §§ 2117 as amended May 12, 1902 (95 O. L. 424); 2122-1; 2131a; 2132a; 2134-1; 2134-2; 2134-3, 2141-1; 2142a, 2142b, 2142c, 2142d, 2142e; 2142e-1 to 2142e-7 inclusive, §§ 409-26, 409-28 and an act relating to garbage bonds (95 O. L. 477) are also carried in Part II.

(2) **Old section 2113 R. S. repealed.**

(3) **Defective ordinance.**—Where an ordinance establishing a board of health was defective because not read three times it was

held that the board was nevertheless a *de facto* board and its acts valid. *Smith v. Lynch*, 29 O. S. 261.

**Character of board.**—Boards of health, as such, were held not to be bodies corporate and to have no express statutory authority to maintain a suit to prevent the pollution of a stream, or to sue or be sued upon any cause of action. *Board of Health v. Columbus*, 12 Dec. 553.

Such boards have certain legislative, *quasi* judicial and executive powers, and may, in some cases,

exercise them in a most summary manner. *Ib.*

Majority of quorum of health board was held sufficient to transact business. *State ex rel. v. Massillon*, 13 Dec. 292; 24 C. C. 249, 2 C. C. (N. S.) 167.

**Provision mandatory** requiring council to establish a board of health. *State ex rel. v. Massillon*, 24 C. C. 249, 253; 2 C. C. (N. S.) 167.

**Appointment of member to place under board** not valid. *State ex rel. v. Newark*, 6 N. P. 523.

## FORM OF ORDINANCE TO ESTABLISH BOARD OF HEALTH.

Ordinance No. ....

To Establish a Board of Health.

Be it ordained by the council of the city [or village] of ....., State of Ohio,

Sec. 1. That under and in pursuance of the authority conferred and the duty imposed upon council by an act entitled, "An act to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit so as to prevent the abuse of such power, as required by the constitution of Ohio, and to repeal all sections of the Revised Statutes inconsistent herewith," passed by the General Assembly of Ohio in extraordinary session on the 22nd day of October, 1902, that the council establish and it does hereby establish a Board of Health for the said city [or village] of ....., to be constituted and its members appointed in accordance with § 187 of said act above referred to. The members of the Board of Health shall give bond in the sum of \$.....

Sec. 2. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed.....19....

.....  
President of Council.

Attest: ..... Clerk.

**Sec. 188. [Quarantine regulations.]**<sup>1</sup> The state board of health, or the board of health of any city, village or township, in time of epidemic or threatened epidemic, or when any dangerous communicable disease is unusually prevalent, may, after a personal investigation by the members or executive officer of such board to establish the facts in the case, and not otherwise, impose a quarantine on vessels, railroads, stages, or any other public or private vehicles conveying persons, baggage or freight,



or used for such purpose, and may make and enforce such rules and regulations as such board may deem wise and necessary for the protection of the health of the people of the community or state; provided, however, that the running of any train or of any cars on any steam or electric railroad, or of steamboats, vessels or other public conveyances shall not be prohibited. A true copy of such quarantine rules and regulations adopted by a local board of health, shall be immediately furnished by such board to the state board of health. Such quarantine rules and regulations, when established by a local board of health, after careful investigation by the state board of health, may be altered, relaxed or abolished by order of said state board and thereafter no change shall be made except by the order of the state board of health, or by the local board, to meet some new and sudden emergency.

(1) **Old section.**— This embodies the provisions of old § 2133 as numbered in the amendments to §§ 2113 to 2148 R. S., inclusive, in 95 O. L. 421. The repeal of § 2133 in § 231 of the Code was evidently intended to mean § 2133 as numbered in the amendments in 95 O. L. 421, and not as numbered in

Bates' Revised Statutes. (§ 212 of the Code.)

In the amendments in 95 Ohio Laws, the numbering of the sections is changed. § 2133 R. S. related to milk inspectors, while 2133 in the amendments relates to quarantine, corresponding to the provisions in the section of the Code above.

**Sec. 189. [Certain laws not repealed; quarantine regulations.]**

The board of health herein provided for shall have all the powers and perform all the duties, not inconsistent with this act, which are conferred or required in sections 2115, 2116, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147 and 2148 of the Revised Statutes of Ohio, as amended May 7, 1902 (95 O. L., 421), and section 2114, of the Revised Statutes of Ohio, as amended May 12, 1902, (95 O. L., 643), and for all purposes such sections as amended shall remain in full

force and effect; and nothing herein contained shall be held to impair, restrict or repeal any portion of the act passed April 23, 1902, entitled "An act authorizing the levy of taxes in municipalities to provide for firemen's, police and sanitary police pension or relief funds, and to create and perpetuate boards of trustees for the administration of such funds";<sup>1</sup> provided, further, that local boards of health shall not have power to close public highways or to prohibit travel thereon, nor to interfere with public officers not afflicted with or directly exposed to any contagious or infectious disease, in the discharge of their official duties; nor to establish a quarantine of one city, village or township against another city, village or township, as such, without permission first obtained from the state board of health, and under such regulations as may be established by the state board. All employes<sup>2</sup> now serving in the health department shall continue to hold their said positions and shall not be removed from office or reduced in rank or pay, except for cause, assigned and after a hearing has been afforded them before the board.

(1) **Pension laws.**—For these laws see § 155 of the Code, page 392.

cer is not an employe as that word is used in this section. *State ex rel. v. Craig*, 69 O. S., 236.

(2) **Employes.**—The health offi-

**Sec. 2114 R. S. [Term of office of members.]** The term of office of the members of the board shall be five years from the date of appointment, and until their successors are appointed and qualified, except that those first appointed shall be classified as follows: One to serve for five years; one for four years; one for three years; one for two years, and one for one year, and thereafter one shall be appointed annually. Provided that in all municipalities now having a board of health, in place of the two members of such board of health whose term of office shall first expire, one shall be appointed for five years; in place of the two members of the board whose term of office shall next expire one shall be appointed for two years, and one for three years, and in place of the two members of the board whose term of office shall thereafter expire one shall be appointed for four years, and one for five years, and thereafter

one shall be appointed annually. [May 12, 1902, 95 v. 643; 95 v. 423; 66 v. 201, S. & S. 828.]

**Sec. 2115 R. S.** [Board shall appoint health officer, clerk, etc.] The board of health shall appoint a health officer,<sup>1</sup> who shall be the executive officer, who shall furnish his name and address and such other information as may be required by the state board of health; and may appoint a clerk, and may appoint, with the consent of council, as many ward or district physicians, or one ward physician for each ward in their city as they may deem necessary, whose duty it shall be to care for the sick poor in his district or ward and to care for the person or persons quarantined in his ward when such person or persons are unable to pay for medical attendance, and to care for all persons sent from his ward to the municipal pest house when such persons are unable to pay for medical attendance. The board of health shall also have power to appoint, with the consent of council, as many persons for sanitary duty as in its opinion the public health and sanitary condition of the corporation may require, and such persons shall have a general police powers, and be known as the sanitary police. The board shall have exclusive control of their appointees, and define their duties and fix their salaries,<sup>2</sup> but no member of the board of health shall be appointed as health officer; neither shall a member of the board of health nor the health officer be appointed as one of the ward physicians. All such appointees shall serve during the pleasure of the board. [97 v. 331; 95 v. 423; 90 v. 88; 85 v. 59; 66 v. 202 (S. & C. 828).

(1) **Provision mandatory.**—Sec. 2115 providing that Boards of Health shall appoint health officers is mandatory in character and the establishment of a Board of Health is a police regulation of the State. State *ex rel.* v. Massillon, 24 C. C. 249, 2 C. C. (N. S.) 167.

(2) **Certificate of funds on hand,** with which to pay health officer's compensation is not necessary before the board makes appropriation for payment of his services. Sec. 45 of the Code does not apply. *Ib.*

**Increase of salary,** of health officer while in office is valid; health officer is not an "officer or appointee" within the meaning of statute prohibiting increase of salary during term of office. *Ib.*

**Term of appointees, how ended.**—The appointment of another officer in the place of one serving as appointee of the board indicates the pleasure of the board that the former appointee shall no longer serve. State *ex rel.* v. Craig, 69 O. S. 236.



**Sec. 2116 R. S. [President pro tem.; meetings of board; duties of clerk.]** The board of health in cities and villages shall elect one of their number president *pro tem.*, who shall preside in the absence of the mayor, and shall do and perform all duties incumbent upon the president. The board shall meet for the transaction of business at least once in each calendar month, and as much oftener as is necessary for the prompt and thorough transaction of its business. All special meetings of the board shall be called by the president or three members thereof. The clerk of the board shall keep a full and accurate record of all proceedings of the board, together with a record of all births, deaths and cases of contagious diseases reported to the health officer, and at the expiration of his term of office shall turn over to his successor all books, records, papers, and other matter belonging to the board. Each board of health, or the health officer where there is no board of health, shall procure suitable books, blanks, and other things actually necessary to the transaction of its business. Among the books to be procured and kept shall be a suitable book or books for the registration of births and deaths, and cases of infectious or contagious disease. [95 v. 423; Bates R. S., § 2120.]

(1) § 2117 R. S., which follows health in townships. For this section this is not re-enacted and not repealed. It relates to boards of health in townships. For this section, see under BOARD OF HEALTH, Part II, p. 593.

**Sec. 2118 R. S. [Orders and regulations of city, village, hamlet or township board.]** The board of health of any city, village, hamlet or township may make such orders and regulations as it may deem necessary for its own government, for the public health, the prevention or restriction of disease, and the prevention, abatement or suppression of nuisances.<sup>1</sup> All orders and regulations not for the government of the board, but intended for the general public, shall be adopted, advertised, recorded and certified as are ordinances of cities and villages;<sup>2</sup> and the record thereof shall be given, in all courts of the state, the same force and effect as is given such ordinances; and in townships the posting of such orders and regulations in five conspicuous places within the township shall be deemed a sufficient notice thereof. [95 v. 424; Bates R. S., § 2122.]

(1) **Municipal liability.** — The municipality or its officers in their official capacity are not liable for damages resulting from the negligence of the board of health or health officer. *Turner v. Toledo*, 15 C. C. 627.

Boards of health are invested with legislative, quasi-judicial and executive or governmental powers, in the exercise of which, proceedings of a most summary character are permitted, but they are not liable for negligence in the discharge of their official functions. *Board of Health v. Columbus*, 12 Dec. 553.

**Scope of power.** — Boards of health have power to make reasonable regulations for the sanitary inspection of houses of prostitution, and the examination of their inmates to prevent infectious diseases and to promote the public health. *Cincinnati v. Allison*, 12 Dec. 376.

A regulation by a board of health requiring all known prostitutes to submit to a personal examination once every week by a district physician and providing for the issuance of certificates to those free from venereal disease and requiring the expense of the regulation to be paid by the persons examined, is not unreasonable; but the fees charged must be paid into the city treasury and cannot be paid directly to the physicians. *Ib.*

The board may require all physicians to register, but it cannot make the right to register depend on approval of officer or board after passing on qualifications. *State ex rel. v. Prendergast*, 8 C. C. 401.

Whether board can require vaccination of all pupils as condition to right to attend school, *quere*. *Carr v. Board Ed.*, 1 N. P. (N. S.) 602, 13 Dec. 430; such power is probably given only to Board of Education. But where latter board adopts the order, it may be enforced. *Ib.*

A health ordinance requiring a permit from the board of health before milk could be sold in the city, and authorizing examination and inspection of milk sold and the places where cows were kept, was held valid. *Walton v. Toledo*, 23 C. C. 547; 3 C. C. (N. S.) 295, (aff'd 69 O. S. 548).

See further notes to paragraphs 3 and 16, § 7 of the Code, pages 46 and 55.

Boards of health as such are not bodies corporate, and have no express statutory authority to maintain a suit to prevent the pollution of a stream, or to sue or be sued upon any cause of action. *Board of Health v. Columbus*, 12 Dec. 553.

(2) See § 124 of the Code, page 317.

**Sec. 2119 R. S.** [Penalty for violation of this act.] Whoever violates any provisions of this chapter,<sup>1</sup> or any order or regulation of the board of health made in pursuance thereof, or obstructs or interferes with the execution of any such order, or wilfully or illegally omits to obey any such order, shall be fined in any sum not exceeding one hundred dollars or imprisoned for any time not exceeding ninety days, or both; but no person

shall be imprisoned under this section for the first offense, and the prosecution shall always be as and for a first offense, and unless the affidavit upon which the prosecution is instituted contains the allegation that the offense is a second or repeated offense. [95 v. 424; Bates R. S., § 2137.]

(1) See note (1) to § 187 of the Code, page 418,

**Sec. 2120 R. S. [Violation by a corporation.]** If such violation, obstruction, interference or omission be by a corporation, it shall forfeit and pay to the proper city, village, hamlet or township, any sum not exceeding three hundred dollars, to be collected in a civil action brought in the name of the city, village, hamlet or township; and any officer of such corporation having authority over the matter, and permitting such violation, shall be subject to fine or imprisonment, or both as heretofore provided. The judgment herein authorized being in the nature of a penalty, or exemplary damage, no proof of actual damages shall be required, but the court or jury, finding other facts to justify recovery, shall determine the amount by reference to all the facts, culpatory, exculpatory or extenuating, adduced upon the trial. [95 v. 425; Bates R. S., § 2138.]

**Sec. 2121 R. S. [Prosecutions; how instituted.]** Prosecutions under this chapter<sup>1</sup> and the civil action provided for in the preceding section, shall be instituted before any justice of the peace within the county, or justice of the peace, mayor or police judge of the city or village where the offense was committed, or the offending person resides. If imprisonment is, or may be a primary penalty, the court shall, after plea of not guilty, unless a trial by jury is waived, issue a venire to any constable of the county, containing the names of sixteen electors residing within the county, to serve as jurors to try such cause. Each party shall be entitled to two peremptory challenges, and challenges for cause in all particulars, as in criminal cases in the court of common pleas. If the sixteen names be exhausted without obtaining a panel of twelve, the court may direct the constable to summon any of the bystanders to fill the panel to twelve, or on demand, shall issue other venires for four electors at a time, until the panel of twelve is full. In prosecutions under this chapter, no deposit for costs shall be required; and a judgment or verdict of guilty shall be immediately followed by sentence and execution thereof, unless suspended pending the preparation and allowance of a bill of exceptions; and all fines collected under this chapter shall be paid to the treasurer of the



municipality or township and credited to the sanitary fund of the board of health instituting the prosecution. No fine imposed in any prosecution under this section shall be remitted by the magistrate before whom the complaint is made. [95 v. 425; Bates R. S., § 2139.]

(1) See note (1) to § 187 of the Code.

**Sec. 2122 R. S. [Abatement of nuisances by board of health.]** The board of health shall abate and remove all nuisances within its jurisdiction.<sup>1</sup> It may compel the owners, agents, assignees, occupants, or tenants of any lot, property, building or structure upon or in which any nuisance may be, to abate and remove the same by orders therefor, and treat the neglect or refusal to obey orders for such purpose as a misdemeanor punishable as hereinbefore provided. The board of health may, except in cities having a building department, or otherwise exercising the power to regulate the erection of buildings, regulate the location, construction and repair of all water-closets, privies, cesspools, sinks, plumbing and drains; and in such cities having such departments or exercising such power, the council shall by ordinance prescribe such rules and regulations as are approved by the board of health, and shall provide for the enforcement thereof.

The board may also regulate the location, construction and repair of all yards, pens and stables, and the use, emptying and cleaning thereof and of all water-closets, privies, cesspools, sinks, plumbing, drains, or other places where offensive or dangerous substances or liquids are or may accumulate, and when any building, erection, excavation, premises, business, pursuit, matter or thing, or the sewerage, drainage, plumbing, or ventilation thereof is, in the opinion of the board of health, in a condition dangerous to life or health, and when any building or structure is occupied or rented for living or business purposes and sanitary plumbing and sewerage, are feasible and necessary, but neglected or refused, the board of health may declare the same a public nuisance and may order the same to be removed, abated, suspended, altered, or otherwise improved or purified by the owner, agent or other person or persons having control of the same, or being responsible for the condition; and the refusal or neglect to obey said order shall be a misdemeanor, punishable as hereinbefore provided. The board may also, by its officers and employes, remove, abate, suspend, alter, or otherwise improve or purify the same, and certify the costs and expense thereof to the county auditor, to be assessed against the property, and thereby made a lien upon the same, and collected as other taxes. [98 v. 188; 95 v. 426; Bates R. S. (3rd Ed.) 2116, 2128.]

(1) **Nuisances.**—See notes to paragraph 3, § 7 of the Code, p. 46.

## FORM OF NOTICE TO ABATE NUISANCE.

City [or village] of.....,  
 Office of the Board of Health.  
 .....19....

To.....

You are hereby notified that the board of health adopted the following resolution, on....., 19....,

“Resolved, that in the opinion of the board of health the.....  
 (here name the nuisance) on the following described premises (here describe premises), constitutes a public nuisance and the same is hereby declared to be a public nuisance and ordered to be abated, by..... (here state alteration, disinfection or whatever required) within.....days after the service of notice of this resolution upon the owner of said premises, or the same may be done at the expense of the city [or village] and charged to said owner, and assessed against his property; and disobedience of this order shall be punished as provided by law; and the clerk is directed to serve notice of this resolution and order upon the owner, agent or other person having control of or occupying said premises.”

This resolution and order must be complied with, within.....days from the service of this notice.

By order of the Board of Health.

.....  
 Clerk.

**Sec. 2123 R. S. [Proceedings where order of board is neglected or disregarded.]** In all cases where the order of the board of health is neglected or disregarded, in whole or in part, the board may elect to cause the arrest and prosecution of the person or persons offending as hereinbefore provided, or may elect to do and perform, by its officers and employes, what the offending party should have done. If the latter course is chosen, before the execution of the order of the board is begun, it shall cause a citation to issue, and be served upon the person or persons responsible, if residing within the jurisdiction of the board; but if not, shall cause it to be mailed by registered letter to said person, if the address is known or can be found by ordinary diligence; and if the address cannot be found by ordinary diligence, shall cause the citation to be left upon the premises, in charge of any person residing thereon; otherwise it shall be posted conspicuously thereon. The citation shall briefly recite the cause of complaint, and require the owner or other person or persons responsible, to appear before the board of health at a time and place stated, or as soon thereafter as a hearing can be had, and show cause, if any, why the board should not proceed and furnish the material and labor necessary to, and remove the cause of complaint. [95 v. 426; Bates R. S., § 2120.]

**Sec. 2124 R. S. [Further proceedings.]** If the person or persons cited appear, he or they shall be fully apprised of the cause of complaint and given a fair hearing. The board shall then make such order as it deems proper, and if material or labor is necessary to satisfy the order, and the person or persons cited promise, within a definite and reasonable time, to furnish the same, the board shall grant such time; but if no such promise is made, or kept, the board shall furnish the material and labor, cause the work to be done, and certify the cost and expense to the auditor of the county. If the material and labor are itemized, and the statement is accompanied by the certificate [of the president] of the board, attested by the clerk, reciting the order of the board, and that the amount is correct, the auditor shall have no discretion, but shall place the sum against the property upon which the material and labor were expended, which shall, from the date of entry, be a lien upon the property, and be paid as other taxes are paid. [95 v. 426; Bates R. S., § 2129.]

**Sec. 2125 R. S. [Duty of physician, house owner, etc., to give notice of prevalence of infectious diseases; duty of board thereafter.]** Every physician or other person called to attend any person who is suffering from smallpox, cholera, plague, yellow fever, typhus fever, diphtheria, membranous croup, scarlet fever, or typhoid fever, or any other disease dangerous to the public health, or required by the state board of health to be reported, shall report the same to the health officer within whose jurisdiction such person is found, giving in such report the name, age, sex and color of the patient, and the house or place in which such person may be found; and in like manner it shall be the duty of the owner or agent of the owner of a building in which a person resides who has any of the diseases herein named or provided against, or in which are the remains of a person having died of any such disease, and the head of the family, immediately after becoming aware of the fact, to give notice thereof to the health officer; and when complaint is made or a reasonable belief exists that an infectious or contagious disease prevails in any house or other locality which has not been reported as hereinbefore required, the board shall cause such house or locality to be inspected by its health officer, and on discovering that such infectious or contagious disease exists, the board may, as it deems best, send such person so diseased to a quarantine hospital or other place provided for such persons, or may restrain them and others exposed within said house or locality from intercourse with other persons, and prohibit



ingress and egress to or from such premises.<sup>1</sup> [95 v. 427; Bates R. S., § 2118 and latter part of § 2117.]

(1) **Scope of power.** — The power here given, in case of infectious disease in any house, is very broad. Under it the board may quarantine a house, and the owner could not recover damages, although it might be a very serious loss to him. *Turner v. Toledo*, 15 C. C. 627, 634.

If, however, an injury is inflicted in such case, by malice of the public officers, the owner would have a remedy. *Ib.*

The board would have power to make a contract with persons for the care of patients with infectious diseases quarantined in their houses, and the municipality would be bound by this contract. *Ib.*

**Action against physician.** — Proper action against physician for failure to report small pox, etc., was held to be a civil action in the name of the state to recover the penalty and not by warrant for arrest. *State v. Chandler*, 7 B. 97.

**Sec. 2126 R. S. [Quarantine of person having, or having been exposed to, contagious disease.]** It shall be the duty of the board of health when a case of smallpox, cholera, plague, yellow fever, typhus fever, diphtheria, membranous croup, or scarlet fever is reported within its jurisdiction, to at once cause to be placed in a conspicuous position on the house wherein any of the aforesaid diseases occur a quarantine card having printed on it in large letters the name of the disease within, and to prohibit entrance to or exit from such house without written permission from the board of health; and no person quarantined by a board of health on account of having a contagious disease, or for having been exposed thereto, shall leave such quarantined house or place without the written permission of the board of health; and every physician attending a person affected with any of the aforementioned diseases shall use such precautionary measures to prevent the spread of the disease as may be required by the board of health. No person shall remove, mar, deface or destroy such quarantine card, which shall remain in place until after the patient has been removed from such house, or has recovered and is no longer capable of communicating the disease, and the said house and the contents thereof have been properly purified and disinfected by the board of health, and where other inmates of said house have been exposed to and are liable to become ill of any of said diseases, for a period thereafter counting from the completion of disinfection, as follows, to-wit: in diphtheria or membranous croup, 14 days; in smallpox, 17 days; in scarlet fever, 10 days; in cholera or yellow fever, 7 days; in typhus fever, 21 days; and in cases of measles, chickenpox and whooping cough, or either of them, the board of health may

require the same report of cases and may enforce the same quarantine and other preventive measures as are provided for in this chapter in case of scarlet fever, or diphtheria. The board of health may employ as many persons as it deems necessary to execute its orders and properly guard any house or place containing any person or persons affected with any of the diseases named herein, or who have been exposed thereto, and such persons shall be sworn in as quarantine guards, shall have police powers, and may use all necessary means to enforce the provisions of this chapter for the prevention of contagious or infectious disease, or the orders of any board of health made in pursuance thereof.<sup>1</sup> [95 v. 427.]

(1) As to contracts under this C. C. 822; 6 C. C. (N. S.) 398. section, see Meily v. Columbus, 27

**Sec. 2127 R. S. [Penalty for appearance in public place of person suffering with contagious disease; penalty for unlawful disposal of infected property.]** Any person who, while suffering from smallpox, cholera, plague, yellow fever, diphtheria, membranous croup, scarlet fever, wilfully or unlawfully exposes himself in any street, shop, inn, theatre or other public place or public conveyance, or being in charge of any person so suffering so exposes such sufferer, or gives, lends, sells, transmits or exposes, without previous disinfection by the board of health, or under its direction, any bedding, clothing, rags or other thing which has been exposed to infection from any such disease, or who knowingly lets for hire any house, room or part of a house in which any person has been suffering from any such disease, prior to such house, room, or part of a house having been disinfected by the board of health, shall be guilty of a misdemeanor and punishable as hereinbefore provided. [95 v. 428.]

**Sec. 2128 R. S. [Disinfection of house in which person has been ill with contagious disease; procedure; destruction of infected property; compensation for property destroyed.]** It shall be the duty of every physician who is attending a person affected with smallpox, yellow fever, typhus fever, diphtheria, membranous croup, or scarlet fever, when such person has recovered and is no longer liable to communicate the disease to others, or has died, to furnish a certificate to the proper board of health of such recovery or death, and as soon thereafter as the board of health deems it advisable its health officer or other person appointed for the purpose shall thoroughly disinfect and purify the house and contents thereof in which such person has been ill or has died, which disinfection and purification shall be done in accordance with the rules and regulations adopted and promulgated by the state board of health, and the local board of health may purchase such disinfecting apparatus and sup-

plies as it deems necessary for such purpose; and upon the request of the owner or occupant of any dwelling house, or the head of any family, the board of health shall purify and disinfect any room which has been occupied by any person suffering from pulmonary tuberculosis, commonly called consumption, or room in which any person has died from said disease; the expenses of disinfection shall be paid by the local board of health, and said board may destroy any infected clothing, bedding, or other article which cannot be made safe by disinfection, and shall furnish to the owner thereof a receipt, of which it shall keep a full and accurate copy, for articles so destroyed, which receipt shall show the number, character, condition and estimated value of the articles destroyed and when any buildings, hut, or other structure has become infected with smallpox or other dangerous communicable disease, and cannot, in the opinion of the board of health, be made safe by disinfection, the board may have such building, hut, or other structure appraised and destroyed, and the council of cities and villages, or other board or body having the powers of council, and the trustees of hamlets and townships, upon the presentation of the original receipt or written statement of the appraisers for articles or houses so destroyed, shall pay to the owner thereof, or other person authorized by the owner to receive the same, the estimated value of such destroyed articles, or such sum as the council or other legislative body may deem a just compensation therefor, and in the event the owner is not satisfied with the amount so allowed he may sue for the value thereof.

**[Maintenance of person confined in quarantined house.]** When a house or other place is quarantined on account of contagious diseases it shall be the duty of the board of health having jurisdiction to provide for all persons confined in such house or place, food, fuel, and all other necessities of life, including medical attendance, medicine and nurses, when necessary; and expenses so incurred, except those for disinfection, quarantine, or other measures strictly for the protection of the public, when properly certified by the president and clerk of the board of health, or health officer where there is no board of health, shall be paid by the person or persons quarantined, when able to make such payment, and when not by the city, village, hamlet or township in which he or they were quarantined, provided that when a person with a contagious disease quarantined in any county is a legal resident of some other county of this state, and is unable to pay such expenses, they shall be paid by the county in which he has a legal residence, if notice and a sworn statement of the amount of such expenses are sent to the infirmary directors of said county within thirty days after the quarantine in such case was discharged; provided, further, that the ex-



penses for quarantining a county infirmary or other county public institution, shall be paid by the county when properly certified by the president and clerk of the board of health or health officer, where there is no board of health, of the municipality, or township in which said institution is located. [1904, May 3, 97 v. 540; 95 v. 428.]

**Sec. 2129 R. S. [Person residing in quarantined house shall not attend any public gathering until quarantine is removed.]** No person residing in or occupying any house in which there is a person suffering from smallpox, cholera, plague, typhus fever, diphtheria, membranous croup, or scarlet fever, shall be permitted to attend any public, private, or parochial school or college or Sunday school, or any other public gathering, until the quarantine provided for in such diseases in section 2126 has been removed by the board of health, and all school principals, Sunday school superintendents, or other persons in charge of such schools, are hereby required to exclude any and all such persons until such time as they may present a written permit of the board of health to attend or re-enter such schools. [95 v. 429.]

**Sec. 2130 R. S. [Hospital for treatment of persons suffering from contagious disease; bond issue.]** The council or other legislative body of any city may purchase land or lands within or without its boundaries and erect thereon suitable hospital buildings for the isolation, care or treatment of persons suffering from a dangerous contagious disease, and provide for the maintenance of such hospital; the plans and specifications for such building or buildings shall be approved by the board of health, and the council or other legislative body is hereby authorized to issue bonds; if after an election held for that purpose, two-thirds of the votes cast at said election are in favor of said issue, in any amount not to exceed \$25,000, and at a rate of interest not to exceed 5 per cent per annum, the principal to be paid within ten years and the proceeds applied for the purposes aforesaid, and after the erection of such hospital buildings the council or other legislative body may annually make such appropriations for their use, care and maintenance as in its judgment are necessary. Said hospital buildings shall be under the charge and control of the board of health of such city, said board to appoint all employes or other persons necessary to the use, care and maintenance of such hospital buildings, and to regulate the entrance of patients thereto, and their care and treatment therein. When any person suffering from any dangerous contagious disease is found in any hotel, lodging house, boarding house, tenement house or other public place in any city, the board of health may, if it deems it necessary for the protection of the public health, remove such person to the hos-

pital herein provided for, where all needful provisions shall be made for his care and treatment, and the expenses so incurred shall be paid by such person, if such person is able to pay said expenses.

[**Quarantine hospital.**] Any city, village, hamlet or township may establish a quarantine hospital, within or without its own limits, but if such place be without its limits, the consent of the municipality or township within which it is proposed to establish it shall be first obtained,<sup>1</sup> provided that such consent shall not be necessary if such hospital is more than 800 feet from any occupied house or public highway; and when great emergency exists, the board of health may seize and occupy and use temporarily for such quarantine hospital any suitable vacant house or building within its jurisdiction, and the board of health of the city, village, hamlet or township having a quarantine hospital shall have exclusive control of the same. [95 v. 430.]

(1) **Pest house.**—See note to  
§ 2169 R. S. p. 366.

**Sec. 2131 R. S. [Disposal of bodies of persons dying of contagious diseases.]** The bodies of persons who have died of smallpox, cholera, plague, yellow fever, typhus fever, diphtheria, membranous croup, scarlet fever, or other dangerous contagious or infectious disease shall be buried or cremated within twenty-four hours after death except by written permission of the board of health, and no public or church funeral shall be held in connection with the burial of a person who has died of any of the above named diseases, and the body of any such person shall not be taken into any church, chapel, or other public place, and only the adult members of the family and such other persons as are actually necessary shall be present at the burial or cremation of such body. [95 v. 430.]

**Sec. 2132 R. S. [Admission of persons suffering with contagious disease into prisons or benevolent institutions.]** No person suffering from smallpox, or other dangerous contagious or infectious disease shall be sent to or admitted into any prison, jail, workhouse, infirmary, childrens' or orphans' home or state hospital or institution for the insane, epileptic, blind, feeble-minded, or deaf and dumb, or other state or county benevolent institution, and no person who has been exposed to, and is liable to become ill of any such disease shall be sent to any such hospital, home or institution hereinbefore mentioned without first making known the facts concerning such exposure to the superintendent, manager or other person in charge thereof; and when smallpox or other dangerous contagious or infectious disease is present in any jail or prison, and a prisoner therein who has

been exposed to any such disease has been sentenced to the penitentiary, such prisoner shall be confined and isolated in such jail or prison or other proper place upon the order of the proper court for such time as is necessary to establish the fact that he had not contracted the disease to which he was exposed.

[Contagious disease in prison or benevolent institution.] When smallpox, cholera, yellow fever, diphtheria, scarlet fever or other dangerous contagious or infectious disease appears in any prison, jail, workhouse, infirmary, childrens' or orphans' home, state hospital for the insane, or epileptic, or institution for the blind, feeble-minded or deaf and dumb, or other state or county benevolent institution, the superintendent or manager thereof shall at once isolate the person or persons affected with any such disease and enforce the provisions of this chapter for the prevention of contagious diseases, in so far as they can be applied, and the rules, regulations and orders of the state board of health to that effect, and the trustees or managers of any such institution shall have authority to erect any necessary temporary buildings for the reception of any such person or persons, or for the detention of any person or persons who have been exposed to any such disease and may remove any such persons to and confine them in such building or buildings; and such trustees or managers may contract for the care, treatment or detention of any such persons with any corporation having a hospital or other proper place for the isolation and care of persons suffering from contagious disease, or exposed thereto, and may remove such person to such hospital or place, provided that in the case of persons detained in any institution as punishment for any crime an order for such removal shall be obtained from the court having imposed such punishment, and said court, in such order for removal, may require such provisions to be made for safely guarding such prisoner while in such hospital or place as it may deem necessary. [95 v. 431.]

**Sec. 2134 R. S.** [Effect of declaring quarantine.] Whenever quarantine is declared all railroads, steamboats, or other common carriers, and the owners, consignees, or assignees of any railroad, steamboat, stage, or other vehicle used for the transportation of passengers, baggage or freight, shall submit to any rules or regulations imposed by any board of health or health officer; they shall submit to any examination required by the health authorities respecting any circumstance or event touching the health of the crew, operatives or passengers, and the sanitary condition of the baggage and freight; and any owner, consignee or assignee, or other person interest-



ed as aforesaid, who makes any unfounded statement or declaration respecting the points under examination, shall, upon conviction thereof before any court or justice of the peace, having jurisdiction be subjected to the penalties herein provided for violations of the requirements of this chapter and the orders of the state or local boards of health. [95 v. 432; Bates R. S., § 2144.]

**Sec. 2135 R. S. [To whom and what quarantine rules shall apply.]** All rules and regulations passed by the board of health or health officer, shall apply to all persons, goods, or effects arriving by railroad, steamboat, or other vehicle of transportation, after quarantine is declared. [95 v. 432; Bates R. S., § 2145.]

**Sec. 2136 R. S. [Needful buildings may be erected; disinfection, etc., of property.]** The state board of health or any local board of health shall be authorized to erect any temporary wooden buildings or field hospitals deemed necessary for the isolation or protection of persons or freight supposed to be infected, and may employ nurses, physicians and laborers sufficient to operate the same properly, and sufficient police to guard the same. The board of health may cause the disinfection, renovation or complete destruction of bedding, clothing, or other property belonging to corporations or individuals, when such action seems to such board necessary, or a reasonable precaution against the spread of contagious or infectious diseases. [95 v. 432; Bates R. S., § 2146.]

**Sec. 2137 R. S. [Board of health in its relation to schools and school buildings; gratuitous vaccination.]** The board of health is hereby required to inspect semi-annually, and oftener if in the judgment of the board it shall be deemed necessary, the sanitary condition of all schools and school buildings within its jurisdiction and may, during an epidemic or threatened epidemic, or when any dangerous communicable disease is unusually prevalent, close any school and prohibit public gatherings for such time as it may deem necessary, and may disinfect any school building. The board shall abate all nuisances and may remove or correct all conditions detrimental to health or well-being found upon school property by serving an order upon the board of education, school board, or other person or persons responsible for such property, for the abatement of such nuisance or condition within a reasonable but fixed time, and any person failing to comply with such order, unless it is shown that there was good and sufficient reason therefor, shall be fined in any sum not exceeding one hundred dollars. The board may

appoint such number of inspectors of schools and school buildings as it may deem necessary to properly carry out the provisions of this section. The board of health may take measures and supply agents and afford inducements and facilities for gratuitous vaccination. [95 v. 433; Bates R. S., § 2135.]

**Sec. 2138 R. S.** [Power of municipality or township to borrow money and levy tax therefor in time of epidemic or threatened epidemic.] In case of any epidemic, or threatened epidemic, or during the unusual prevalence of any dangerous communicable disease, the council of any city or village or trustees of any hamlet or township, if funds are not otherwise available, shall borrow until such time as the next levy and collection thereof be made, and at a rate of interest not to exceed six per cent. per annum, any sum of money that the local board of health may deem necessary to defray the expenses necessary to prevent the spread of any dangerous communicable disease, and the board of health may proceed to expend the amount so authorized to be borrowed, which sum, or so much thereof as may be expended, shall be a valid claim against the city, village, hamlet, or township, payable from the fund so created; and when expenses are incurred by the board of health, under the provisions of this chapter,<sup>1</sup> it shall be the duty of council, upon application and certificate from the board of health, to pass the necessary appropriation ordinances to pay the expenses so incurred and certified; and the council is hereby empowered to levy (subject only to the restrictions contained in the ninth division of this title)<sup>2</sup> and set apart the necessary sum to pay such expenses, and to carry into effect the provisions of this chapter, and the provisions of section 2702<sup>3</sup> shall not apply to the necessary expenses of the board of health, and the trustees of each township may annually levy and set aside for the expenses of the township board of health such sum as they deem necessary. [95 v. 433; Bates R. S. §§ 2148.]

(1) See note (1) under § 187 of the Code, page 418.

(2) The ninth division of Title XII., here referred to, related to "Finance and Taxation," and contained §§ 2681 to (2729-11) R. S. All these sections are repealed, except 2681 (relating to hamlets) and 2709 (identical with Code § 97), and those sections which are re-

enacted in § 96 of the Code, and the provisions corresponding to those in the ninth division are now contained in §§ 95 to 100 both inclusive, and § 32 to 49 both inclusive, of the Code.

(3) § 2702 is repealed by the Code and the provisions corresponding to it are contained in § 45 of the Code.

**Sec. 2139 R. S.** [Inspectors; appointment and duties; record of meat and milk dealers; permit.] The board of health may appoint such number of inspectors of dairies, slaughterhouses, shops, wagons, appliances, food and water supplies for animals, milk, meat, butter, cheese and substances purporting to be butter or cheese, or having the semblance of butter or cheese and such other persons as may be necessary to carry out the provisions of this chapter,<sup>1</sup> define their duties, and fix their compensation, and the health officer may be appointed and authorized by said board to perform all the duties of such inspectors; and such inspectors may, for such purpose, enter any house, vehicle, or yard; and the board of health shall keep for public inspection a record of the names, residences, and places of business of all persons engaged in the sale of milk or meat, and may require permits, to be renewed semi-annually and for which a charge of not more than fifty cents may be made, after inspection, to vend either milk or meat, and the board may refuse to grant such permit or revoke one already given if, upon inspection, the cows or milk are found to be kept in an unsanitary condition; and the board may require a certificate from a licensed veterinarian showing the cows furnishing milk brought for sale within its jurisdiction are free from tuberculosis or other dangerous disease, and should scarlet fever, typhoid or other dangerous contagious or infectious disease occur in the family of any dairyman or among his employes, or in any house in which milk is kept for sale, it shall be the duty of such dairyman or vendor of such milk to immediately notify the health officer of the city, village or hamlet in which such milk is sold, or is offered for sale, of the facts of the case, and the health officer may order the sale of such milk stopped, pending an investigation to be made without delay, and for such time thereafter as the board of health may require; and the board of health may make and enforce such orders as it may deem necessary to prevent the sale of impure, adulterated, and unwholesome milk, or milk liable to carry disease. [95 v. 434; Bates R. S. § 2133.]

(1) See note (1) to § 187 of the Code, page 418.

**Sec. 2140 R. S.** [Places where meat, butter, cheese, etc., are made, subject to inspection; analysis of milk, butter, etc.] All dairies, including the cows, cow stables, milk-houses, and milk-vessels, the owners of which offer for sale within the limits of the corporation milk or butter manufactured by such owners,



shall be subject to inspection by the inspectors, and also any manufactory of butter or cheese, or place where such substances or either of them are sold, shall be subject to inspection by the inspectors; the inspector may enter any place where milk is sold, or kept for sale, and all carriages used for the conveyance of milk within the corporate limits; and also any manufactory or place where butter or cheese, or substances having the semblance of butter or cheese, are manufactured, or any place where such substances are sold, or kept for sale within the corporate limits; and whenever he has any reason to believe milk found therein is impure or adulterated, or any butter or cheese, or substances having the semblance of butter or cheese found therein contain any impure, unwholesome or deleterious substances, or is being sold or offered for sale under any false, or deceptive name or designation, that any butter or cheese not made from pure cream or milk, or any substance having the semblance of butter or cheese, is being sold or offered for sale, without being branded or stamped, as required by section seven thousand and ninety, he shall take specimens thereof and subject them to satisfactory tests; or, if the board of health so direct, to chemical analysis, the result of which he shall record and preserve as evidence, and a certificate of such result, sworn to by the analyst shall be admissible in evidence in all prosecutions under this chapter, or any law of this state. [95 v. 435; Bates R. S., § 2134.]

**Sec. 2141 R. S. [Registration of births, marriages, deaths, interments, etc.; removal or conveyance of corpse.]** The board of health may create a complete and accurate system of registration of births, marriages, deaths and interments occurring within its jurisdiction, for the purpose of legal and genealogical investigations, and to furnish facts for statistical, scientific [and sanitary] inquiries; and no corpse shall be buried or cremated within the state of Ohio, or taken out of the state without a permit from the board of health where the death occurred, and before granting such permit the board of health, if the corpse is to be transported beyond its jurisdiction, shall receive from the undertaker or person in charge of the corpse a written certificate certifying that it has been prepared in accordance with the rules of the state board of health, and any person wilfully making a false statement relative to the preparation of a corpse shall be punished as provided in section 2119 of this chapter; <sup>1</sup> and no sexton, superintendent, or other person in charge of any cemetery, burial grounds, or crematory shall receive a corpse for burial, or cremation, unless accom-

panied with the permit of the board of health provided for herein, and no common carrier, its agent, conductor or other employe shall receive for conveyance, or convey the remains of a deceased person without having first complied with such regulations as shall be made by the state board of health. [95 v. 434; Bates R. S. § 2116 (latter part), and § 2119.]

(1) See note (1) to § 187 of the Code, page 418.

#### FORM OF BURIAL PERMIT.

City [*or* village] of.....  
Office of the Board of Health.  
.....19....

Permission is hereby given to bury in.....cemetery  
[*or* cremate *or* remove out of the state] the remains of.....,  
who died.....19...., at....., aged.....,  
of....., attended by .....physician.

By order of the Board of Health.  
.....  
Clerk.

**Sec. 2142 R. S. [Scavengers; employment of.]** The council may grant power to the board of health to employ such number of scavengers for the removal of swill, garbage and offal from the houses, buildings, yards, and lots within the city or village as it may deem necessary; and the board in such cases may make the contracts [therefor] thereof, subject to the approval of the council, and to be signed by the proper officers of the council, and may regulate the work to be done, and it shall be the duty of council, upon the request of the board of health, to lease or purchase suitable land or lands, the location of which shall be approved by the board of health, to be used as a dump ground for garbage, swill, offal, night soil and other noxious substances to be removed from such city or village. [95 v. 435.]

**Sec. 2143 R. S. [Definition of sanitary plant; plans and estimates; condemnation of lands for sanitary plant.]** The expression "sanitary plant" as herein used, shall be held to mean a structure with the necessary land and all the necessary fixtures and appliances and appurtenances required for the treatment and purification and disposal, in a sanitary manner, of either or both the liquid or solid wastes of the municipality. Upon the recommendation of the board of health of any city, village, or hamlet, or if in any municipality, the powers usually vested

in a board of health, have been vested in any other officer or board, then upon the recommendation of such officer or board, the city council, legislative body or other governing board, of any municipality, is hereby authorized to cause plans and estimates to be prepared and to acquire by condemnation or otherwise such land or lands within or without corporate limits, as may be necessary to provide for the proper disposal, in a sanitary manner, of the sewage and the garbage and waste matters, or either or any of them of the municipality, and such council, legislative body or other governing board of the municipality, is hereby authorized, upon first obtaining the approval of the state board of health, to contract for, erect and maintain a sanitary plant or plants, on the land or lands acquired under the provisions of this act, together with all buildings, machinery, appliances and appurtenances, necessary for the disposal, in a sanitary and economic manner, of the sewage and garbage, night soil, dead animals, offal, spoiled meats, and fish or any putrid substance, or any liquid or solid wastes, or any substance injurious to health of the municipality. [95 v. 435; Bates R. S. § 2142a.]

**Sec. 2144. R. S.** [Collection, removal and disposal of garbage, night soil, etc.] The said council, legislative body or other governing board, is hereby authorized to contract, for a period not exceeding five years for the collection and removal of such garbage, night soil, dead animals and other solid waste substances, at the expense of such municipal corporation, or at the expense of persons responsible for the existence of such waste substance. [95 v. 436; Bates R. S. § 2142b.]

**Sec. 2145 R. S.** [How funds raised for such purpose.] For the purpose of carrying into effect the foregoing powers, the councils of cities, legislative bodies or governing boards of any municipal corporation or township may use any funds raised, or heretofore authorized in any manner and necessary for said purposes, and in case no funds are available and no bonds have been heretofore authorized for said purposes, and it be necessary to issue and sell bonds for said purposes, then the question of issuing any bonds of the municipality shall be submitted at an election conducted therefor in conformity with provisions of section 2836,<sup>1</sup> except that a majority of the votes cast shall be deemed sufficient to authorize the municipal corporation to issue said bonds under this act, and the council or other legislative body shall not have authority to issue the said bonds unless a majority of the qualified electors of such municipi-



pality voting shall be in favor of the proposition to issue said bonds for said purposes. [95 v. 436; Bates R. S. § 2142c.]

(1) This section, as amended and Act, may be found under § 100 of made part of the Longworth Bond the Code, page 287.

**Sec. 2146 R. S. [Appointment of sanitary board.]** Before submitting said proposition to a vote of the people, the city council, or other legislative body of said municipal corporation may by resolution, determine to have all the work in connection with the erection and maintenance of said sanitary plant and the acquisition of the necessary real estate therefor, put under the control of a sanitary board, which shall be appointed before the vote is taken.

**[Constitution of board; how appointed; term.]** Said board shall consist of two citizens from each of the two political parties casting the highest vote at the last preceding municipal election, who shall be appointed by the mayor by and with the consent and approval of the city council, or other legislative body of said municipal corporation, and shall serve for a term of two years and until their successors are duly appointed.

**[Compensation and powers of board.]** Said board shall have such reasonable compensation as the city council or other legislative body of said municipal corporation may prescribe, and shall have entire control of the erection and maintenance of said sanitary plant and the purchase of the necessary real estate therefor on behalf of said municipal corporation and may, in its discretion, modify said original plans and specifications, subject, however, to the approval of the state board of health, and provided, that the total cost thereof shall not exceed the original estimate. [95 v. 436; Bates R. S. § 2142d.]

**Sec. 2147 R. S. [Levy for sanitary fund.]** For the purpose of providing a fund for the payment of the principal and interest of the bonds issued under this act, and of maintaining said sanitary plant or plants, said city council or other legislative body shall, in addition to the other levies authorized by law, levy annually a sufficient tax therefor on all the property subject to taxation in said municipal corporation and such taxes shall be levied and collected in the same manner as other taxes; and the proceeds thereof shall constitute the "sanitary fund" of said municipal corporation, and shall be held like other funds of said municipal corporation subject only to the written order of said city council or other legislative body, or governing or sanitary board of said municipal corporation

which shall have control of said work. [95 v. 437; Bates R. S. § 2142e.]

**Sec. 2148 R. S.** [Sanitary report; its contents, etc.] It shall be the duty of the board of health, or health department, on or before the fifteenth day of January of each year to make a report, in writing, to the council of the corporation, and to the state board of health, which shall be for the preceding calendar year, upon the sanitary condition and prospects of such city or village, which report shall contain the statistics of deaths, the action of the board and its officers and agents, and the names thereof for the past year; and it may contain other useful information, and the board shall suggest therein any further legislative action deemed proper for the better protection of life and health; and it shall be the duty of said boards of health and health departments to promptly furnish such special reports as may be called for by the state board of health. [95 v. 437; Bates R. S. § 2136.]

### 3. JUDICIAL.<sup>1</sup>

**Sec. 190.** [Police court.] In every city where a police court is now established by law, whether by general acts or by acts designating the city by grade or class or otherwise,<sup>2</sup> said police court shall continue to exercise all powers and functions conferred by said general or special acts, and shall be known as the police court of the city in which the same now exists.

(1) **Constitutional provisions** governing the legislature in establishing inferior courts and fixing their jurisdiction. Art. 4, § 15 of the Const. of Ohio provides that "the General Assembly may increase, or diminish, the number of the judges of the Supreme Court, the number of the districts of the Court of Common Pleas, the number of judges in any district, change the districts, or the sub-divisions thereof, or establish other courts, whenever two-thirds of the members elected to each house shall concur

therein; but no such change, addition, or diminution, shall vacate the office of any judge." Art. 4, § 18 provides that "the several judges of the Supreme Court, of the Common Pleas, and of such other courts as may be created, shall, respectively, have and exercise such power and jurisdiction, at chambers, or otherwise, as may be directed by law."

The municipal Code passed October 22, 1902, did not receive the votes of two-thirds of the members elected to each house of the Gen-

eral Assembly. The enactment of a uniform municipal police court law would have required such a vote. *Steamboat Northern Indiana v. Milliken*, 7 O. S. 383; *State v. Voris*, 8 N. P., 16.

The judicial sections of the Code, with respect both to city and village police courts, must therefore be considered merely as declaratory of the intent of the legislature to leave in force the various systems of municipal courts as previously established by general or special laws. It will be observed, however, that several sections of the Revised Statutes relating to police judges and the jurisdiction of police courts are included in the list of repeals in § 231 of the Code. A two-thirds vote of the legislature is not required to abolish courts established by statute or to limit or restrict their jurisdiction. *State ex rel. v. Wright*, 7 O. S. 333; *State v. Kinninger*, 46 O. S. 570, 574; *State v. Voris*, 8 N. P. 16;

*Backenstoe v. State*, 2 N. P. (N. S.) 178.

**Statutes relating to Police Courts**, referred in §§ 190; 191 and 192 of the Code, and still in force, will be found under the title JUDICIAL in Part II.

(2) **Validity of special acts.**—The Supreme Court has upheld special acts establishing local courts, declaring that § 1 of Art. 4 of the Constitution of Ohio vests in the legislature full power to determine what other courts it will establish, local, if deemed proper, either for separate counties or districts, and to define their jurisdiction; and holding that the power thus conferred is not limited by § 26 of Art. 2 of the Constitution, which ordains that all laws of a general nature shall have uniform operation throughout the state. *State ex rel. v. Bloch*, 65 O. S. 370. See also *Meyer v. Dempsey*, 62 O. S. 637; *State v. Archibald*, 52 O. S. 1.

**Sec. 191. [Jurisdiction thereof; how judges, clerks, etc., chosen.]** The police court of each city as heretofore established and now existing shall have the jurisdiction conferred in any general or special act creating or governing the same, and the judge or judges and clerk, assistant clerks, and all other officers and employes of said court, except the prosecuting attorney,<sup>1</sup> shall be elected<sup>2</sup> or appointed and shall continue to exercise their powers and duties in the manner provided in said existing laws.

(1) **City solicitor as prosecuting attorney** of the police court, see § 137 of the Code.

(2) **Election of police judge and clerk**, where not provided for

in special acts, see § 230 of the Code. The judge must be elected, and clerk also if court is a court of record. Constitution of Ohio, Art. IV., §§ 10 and 16.

**Sec. 192. [Certain acts not repealed.]** All acts or parts of acts providing for such police courts, or regulating the proced-



ure therein, including an act entitled "An act to amend section 6565 of the Revised Statutes of Ohio," passed April 10th, 1902, shall be and remain in full force and effect.<sup>1</sup>

(1) For acts relating to police courts, see title JUDICIAL in Part II.

**Where acts expressly repealed.**

— Where acts relating to police courts are expressly repealed by the

code, whether they would nevertheless remain in force by virtue of sections 190, 191 and 192, see *Lembo v. State*, 14 Dec. 384; *Howard v. State*, 14 Dec. 433; *Bachenstoe v. State*, 2 N. P. (N. S.) 178.

## IV

## ORGANIZATION OF VILLAGES.

## 1. LEGISLATIVE.

**Sec. 193. [Council; number of members, election, term, etc.]<sup>1</sup>**

The legislative power of every village shall be vested in, and exercised by, a council, composed of six members, who shall be elected by the electors of the village, at large, for terms of two years and shall serve until their successors are elected and qualified. At the first municipal election after the taking effect of this act, three councilmen shall be elected for two years, and three councilmen for one year; and each year thereafter three councilmen shall be elected for a term of two years, and shall serve until their successors are elected and qualified.<sup>2</sup>

(1) **Old section.**—Compare old § 1672 R. S., repealed.

(2) See note 3 under § 116 of the Code, p. 304.

**Sec. 194. [Council shall fix bonds and compensation of all officers to be elected or appointed.]** Not later than the first day of January next after the passage of this act, the present council in each municipal corporation classified as a village in this act, shall fix the compensation and bonds of all officers to be elected at the first election held under the authority of this act, as well as the compensation and bonds of all officers to be first appointed hereunder;<sup>1</sup> provided that no compensation shall be allowed to members of council;<sup>2</sup> and provided, further, that the compensation so fixed shall not be increased or diminished during the term for which any such officer may be elected or appointed.<sup>3</sup>

(1) See notes under § 117 of the Code.

(2) **Compensation of councilmen.**—This section is repealed by act of April 20, 1904, so far as it

is inconsistent with section 197 as amended. See note 4 under § 197 *infra*.

(3) See note (4) to § 126 of Code, p. 326.

**Sec. 195. [President pro tem; village employees.]** The council shall, at the first meeting in the month of May of each year, immediately proceed to elect a president pro tem. from their own number, and from time to time provide such employees for the village as they may determine.<sup>1</sup> The president pro tem. of council shall serve for a period of one year, but the employees can be removed at any regular meeting by a majority of the members elected to council.<sup>2</sup>

(1) **Exception.**—See note (2) under § 197 of the Code, *infra*.

(2) Compare § 118 of the Code, and see notes thereunder.

**Sec. 196. [Powers of council.]** Councils of villages shall be governed by the provisions, so far as applicable, of sections 119, 120, 121, 122, 124 and 125 of this act.<sup>1</sup>

**[Mayor shall have no veto power.]** Provided, however, that the provisions of section 125 of this act, so far as said provisions relate to the veto power of the mayor, shall not be applicable to villages; and wherever in said sections the word “city” appears, the word “village” shall be substituted for this purpose.

(1) These sections provide for the government of councils in cities.

**Sec. 197. [Compensation and bonds of officers, clerks and employees.]** Council shall fix the compensation and bonds of all officers, clerks and employees in the village government,<sup>1</sup> except as otherwise provided in this act.<sup>2</sup> All bonds shall be made with sureties subject to the approval of the mayor. The compensation so fixed shall not be increased or diminished during the term for which any officer, clerk or employee may have been elected or appointed;<sup>3</sup> provided that members of council may receive as compensation the sum of two dollars for each meeting, not to exceed twenty-four meetings in any one year,<sup>4</sup> and they shall have such other powers as are conferred upon councils of villages by section 1678 of the Revised Statutes of Ohio. [1904, April 20, 97 v. 118.]

(1) **Form of ordinance** fixing compensation and bonds of of-

ficers and employees, see that given under §227 of the Code.



**Compensation.** — See generally notes to § 227 of the Code.

(2) **Exceptions.** — See §§ 189, 217 and 218 of the Code, § 2115 R. S. re-enacted in § 189 of the Code, and § 2409 R. S., re-enacted in § 205 of the Code.

(3) See note (5) to § 126 of the Code, page 326.

(4) **Compensation of council-**

**men.** — The act of April 20, 1904, amending § 197 contains the following language, in the repealing section . . . "section '94 of an act entitled, An act [etc., the Municipal Code] passed October 22nd, 1902, so far as its provisions are inconsistent with the provisions of this act, is hereby repealed."

**Sec. 1678 R. S. [Prerogative.]** The council shall have the management and control of the finances and property of the corporation, except as may be otherwise provided, and have such other powers and perform such other duties as may be conferred by law.<sup>1</sup> [66 v. 163, § 84.]

(1) **Powers strictly limited.** —

See note (6) to § 7 of the Code, page 44.

**Sec. 198. [Contracts; how made.]** All contracts made by the council of any village shall be executed in the name of the village and signed on behalf of the village by the mayor and clerk, and shall be made subject to the provisions of sections 143 and 144 of this act, so far as the same are applicable.<sup>1</sup>

(1) **Making of contracts.** — The sections above referred to are those which govern the making of contracts by the board of public service in cities.

**Forms of advertisement, bids, etc.,** see those given under § 143 of the Code, page 376.

## 2. EXECUTIVE.

### (A) CHIEF OFFICERS.

**Sec. 199. [Executive power vested in whom.]**<sup>1</sup> The executive power and authority of villages shall be vested in a mayor, clerk, treasurer, marshal, street commissioner, and such other officers and departments as are created by this act.<sup>2</sup> Provided, however, that the village council may, when it deems it necessary, provide legal counsel for the village, or any department or official thereof, for a period not exceeding two years, and provide compensation for the same.<sup>3</sup>

(1) **Old section 1706 R. S.**, repealed.

(2) **Officers.**—Questions relating to powers, liabilities, etc., of municipal officers, see notes under § 128 of the Code, page 328.

**Board of health or health officer.**—Sec. 187 of the Code requires village councils to establish a board of health or appoint a health officer. For form of ordinance establishing board of health, see that given under § 187, page 419.

**Trustees of public affairs.**—Sec. 205 of the Code requires village councils to establish a board of trustees of public affairs in all villages owning, leasing or constructing water-works, electric light plants, artificial or natural gas plants or similar public utilities. For form of ordinance establishing

such board see that given under § 205, page 458.

(3) **Village solicitor** may be employed for a period not exceeding two years, either by a direct resolution of council designating the name of the attorney chosen and the terms of his employment; or by ordinance for the selection by it of a solicitor at stated periods of not exceeding two years; or by resolution directly employing an attorney for any department or officer of the corporation, for some specific legal work, or for a specially designated period not exceeding two years. Certificate that money is in the treasury is not required before contract can be made for employment of legal counsel. See § 45 of the Code, page 173.

#### FORM OF ORDINANCE PROVIDING FOR VILLAGE SOLICITOR.

Ordinance No.....

##### Providing for the employment of a Village Solicitor.

Be it ordained by the council of the village of.....,  
State of Ohio:

Sec. 1. That legal counsel shall be provided for this village, and the person employed as such counsel shall be known as the "Solicitor of the Village of....." Such solicitor shall be employed by council at its first meeting after the passage of this ordinance; and thereafter at the first meeting of council in May annually, a person shall be employed as such solicitor for the ensuing year.

Sec. 2. The salary of the solicitor shall be.....dollars during the period of his service, payable.....

Sec. 3. The solicitor shall be an attorney-at-law, admitted to practice in the courts of Ohio. It shall be the duty of said solicitor to act as attorney and counsel for the village and the officers thereof in their official capacity, and, as such attorney, to prosecute and defend all actions by or against the village or any department or officer thereof during the term of his employment; and to render legal opinions to the council and to any department or officer of the village upon request in writing.

Sec. 4. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed.....19.....

.....  
President.

Attest:

.....  
Clerk.

### *Mayor.*

**Sec. 200. [Mayor: election, term, qualifications, powers and duties.]**<sup>1</sup> The mayor shall be elected for a term of two years, and shall serve until his successor is elected and qualified.<sup>2</sup> He shall be an elector of the corporation. He shall be the chief conservator of the peace within the corporation,<sup>3</sup> and shall have such other powers and perform such other duties as are conferred and required in sections 1746, 1747, 1748, 1750 and 1751, of the Revised Statutes of Ohio; such as are provided in this act, and all other acts or parts of acts applying to all villages of the state, and not inconsistent herewith,<sup>4</sup> provided, that the mayor shall pay over to the treasurer of the village, monthly,<sup>5</sup> all fines, license fees, or other moneys of whatever character which may be collected by him, and shall receive such fees as are provided for by section 1843 of the Revised Statutes of Ohio. The mayor shall be the president of council and shall preside at all regular and special meetings thereof, but shall have no vote except in case of a tie.

**[Vacancy in office of mayor; how filled.]** When the mayor is absent from the village, or is unable for any cause to perform his duties, the president pro tem. of council shall be acting mayor.<sup>6</sup> In case of the death, resignation<sup>7</sup> or removal of the mayor, the president pro tem. of council shall become the mayor and serve for the unexpired term, and until the successor is elected and qualified, and the vacancy thus created in council shall be filled as other vacancies<sup>8</sup> therein, and council shall



elect another president pro tem. from their own number, who shall have the same rights, powers and duties as his predecessor.

**[Mayor's compensation.]** The mayor in addition to the fees provided for in section 1843 of the Revised Statutes of Ohio, shall receive such salary, payable quarterly out of the corporation treasury, as may be provided by ordinance,<sup>9</sup> but the amount shall not be increased or diminished during his term of office.

(1) **Old sections.**—Compare § 1744 R. S. under OFFICERS in Part II., and §§ 1753, 1754 R. S. (repealed).

(2) See note to § 116 of the Code, page 303.

(3) See note (2) under § 129 of the Code, page 330.

(4) **Other statutes** relating to powers and duties of mayor, not re-enacted and not repealed by the Code may be found under OFFICERS in Part II.

(5) **Compare § 1751 R. S.**, re-enacted, which requires the mayor to pay over such moneys *weekly*. The requirement of *monthly* settlements expressly made above, undoubtedly governs. State *ex rel.* v. Hamilton, 47 O. S. 52; State *ex rel.* v. Bailey, 37 O. S. 98, 103.

(6) **Acting mayor's powers**, in villages, which he may exercise in

absence of mayor do not include judicial functions exercised by mayor. State v. Hance, 26 C. C. 273.

(7) **When resignation takes effect.**—Acceptance by council is not necessary before mayor's resignation can take effect. Reiter v. State, 51 O. S. 74.

(8) **Vacancies in village council** are filled by election by council for unexpired term, and upon failure of council to act within thirty days, then by appointment by mayor. See § 120 of the Code, made applicable to villages by § 196, *supra*.

(9) **Form of ordinance** fixing salary and bond of mayor and other municipal officers and employes, see that given under § 227 of the Code, *infra*.

**Sec. 1746 R. S. [Further duties.]**<sup>1</sup> He shall perform all the duties prescribed by the by-laws and ordinances of the corporation; and it shall be his special duty to see that all ordinances, by-laws, and resolutions of the council are faithfully obeyed and enforced; and he shall sign all commissions, licenses, and permits granted by authority of the council, or authorized by this title, and such other instruments as by law or ordinance may require his certificate. [66 v. 169, § 116; (S. & C. 1510, 1511).]

(1) This section is also re-enacted in § 129 of the Code, applying to cities. See notes to it there.

**Sec. 1747 R. S. [Supervision of conduct of officers.]**<sup>1</sup> He shall supervise the conduct of all the officers of the corporation, in-

quire into and examine the grounds of all reasonable complaints against any of them, and cause all their violations or neglect of duty to be promptly punished or reported to the proper authority for correction. [66 v. 169; § 119.]

(1) This section is also re-enacted in § 129 of the Code, applying to cities.

**Sec. 1748 R. S. [Mayor to record his protest against excess of expenditure.]**<sup>1</sup> If, in the opinion of the mayor, an expenditure is authorized by the council exceeding the revenues of the corporation for the current year, it shall be his duty to protest against such expenditure, and enter such protest, and the reason therefor, on the journal of the council. [66 v. 261, § 657.]

(1) This section is also re-enacted in § 129 of the Code, applying to cities.

**Sec. 1750 R. S. [Annual report to council.]** He shall, at the first regular meeting of the council in April of each year, and at such other times as he may deem expedient, report to the council concerning the affairs of the corporation, and recommend such measures as to him may seem proper. [66 v. 179, § 122.]

**Sec. 1751 R. S. [Disposition of fines, etc.]** All fines and forfeitures which may be collected by the mayor, or which may in any manner come into his hands, and all moneys which may be received by him in his official capacity, other than his fees of office, shall be by him paid over to the treasury of the corporation weekly,<sup>1</sup> and at the first regular meeting of the council in each and every month, he shall submit a full statement of all such moneys received, from whom and for what purpose received, and when paid over; but all fines, penalties, and forfeitures collected by him in state cases shall be by him paid over to the county treasurer monthly.<sup>2</sup> [66 v. 170, § 123.]

(1) **Compare § 200 of the Code**, which requires that such moneys shall be paid over *monthly*, and see note (5) to said section.

**Set off.**—Mayor cannot, in an action by city against him to recover fines, etc., collected by him,

set off uncollected costs on the mayor's docket. *Deatrick v. Defiance*, 1 C. C. 340. The fact that council made a settlement with the mayor allowing such set off, will not bar action for full amount of fines, etc. *Ib.*

(2) **In prosecutions in the**

**name of the state**, fines and costs received from persons convicted of misdemeanors under statutes must be paid into the county treasury and where paid into the municipal treasury, the municipality is liable therefor to the county. *Cleveland v. Jewett*, 39 O. S. 271.

**Mayor's fees.**—This section has been held to apply only to village mayors, and not to mayors in cities. *Cambridge v. Smallwood*, 27 C. C. 302; 6 C. C. (N. S.) 230; *Bellefontaine v. Haviland*, 15 N. P. 482; 3 N. P. (N. S.) 99.

**Sec. 1843 R. S. [Fees of officers.]** The costs of the mayor and other officers, in all cases, shall be fixed by ordinance, but in no case greater than the fees for similar services before justices of the peace; and in case of conviction the fees of officers, jurors, and witnesses shall be taxed against the parties convicted; and in case of acquittal of the violation of an ordinance, the costs, except the fees of the mayor and marshal, shall be taxed against the corporation.<sup>1</sup> [66 v. 180, § 197.]

(1) **Where persons convicted work out their fines** and costs, the mayor is not entitled to collect his fees from the municipality. *Gibson v. Zanesville*, 31 O. S. 184.

**Limitation of fees.**—An officer whose compensation is paid in fees is authorized to charge fees in those cases only which are provided by statute. *State v. Lewis*, 22 C. C. 618; affirmed by Supreme Court, see

*Jones v. Commissioners and Lewis v. State*, 57 O. S. 189.

**Necessity of ordinance.**—Until an ordinance is passed fixing the fees, the mayor is not entitled to charge. *Bellefontaine v. Haviland*, 15 N. P. 482; 3 N. P. (N. S.) 99.

**Other statutes on mayor's court** will be found under title JUDICIAL in Part II.

### *Clerk.*

**Sec. 201. [Clerk: election, term and qualifications; powers and duties; seal.]**<sup>1</sup> The clerk shall be elected for a term of two years and shall serve until his successor is elected and qualified. He shall be an elector of the corporation.

The clerk shall attend all meetings of council and keep a record of its proceedings,<sup>2</sup> and of all rules, by-laws, resolutions and ordinances passed or adopted, and the same shall be subject to the inspection of all persons interested; and in case of the absence of the clerk, council shall appoint one of its own members to perform his duties for the time.

The clerk shall perform all the duties of an auditor required in sections 133 and 134 of this act, and whenever the words, "city" or "auditor" appear in said sections, the words, "village" or "clerk" shall be substituted for this purpose. The clerk shall also have the powers and perform the duties con-



ferred and required in sections 1756, 1757, 1758, 1759, 1761, 1762, and 1763, of the Revised Statutes of Ohio, and such other powers and duties as may now or hereafter be conferred or required by ordinance or by any law applying to all villages of the state.

Council shall provide a seal for the clerk, in the center of which shall be the name of the village, and around the margin the words, "village clerk," an impression of which seal shall be affixed to all transcripts, orders, certificates or other papers requiring authentication.<sup>3</sup>

(1) **Old sections.**—Compare old §§ 1755 and 1764 R. S., repealed.

(2) **Correction of journal.**—Clerk has neither the power nor the right to correct the journal of council, after council has passed upon the record of its proceedings; and mandamus will not lie to compel the clerk to do so. *McClain v. McKisson*, 15 C. C. 517, aff'd 54 O. S., 673.

(3) **Seal of clerk is not the seal of the municipality for the purpose of the signing and sealing of deeds of the corporation, and its use for this purpose will not be effectual in such deeds.** *Tiffin v. Shawhan*, 43 O. S. 178. The corporate seal of the village is provided by council and is in the keeping of the mayor. *Ib.* And see § 1745 R. S., under OFFICERS in Part II.

**Sec. 1756 R. S.** [Clerk to make detailed statement of receipts and expenditures.]<sup>1</sup> He shall, on or before the third Monday in March of each year, make and enter in the record book of the corporation, a detailed statement of all the receipts and expenditures, the number and amount of bonds issued, and for what purpose of the corporation for the preceding year, stating from what sources the money was received, and to whom paid, and for what purposes expended and showing the exact condition of the several funds of the corporation, and all outstanding liabilities, if any, to whom due, and for what purpose. [1883, March 21: 80 v. 65; Rev. Stat. 1880; 67 v. 71, § 129.]

(1) This section is also re-enacted in § 134 of the Code, where it is made to apply to city auditors.

**Sec. 1757 R. S.** [Statement to be posted at voting precincts, or published in newspaper; penalty for neglecting; publication in book form sufficient.]<sup>1</sup> He shall cause a copy of said detailed

statement, which shall be approved by the mayor to be posted at the places of holding elections for officers of the corporation, on the first Monday of April, annually; any incorporation having a population of over two thousand (2000), the clerk shall have same published once in some newspaper published or of general circulation in the corporation, at least five days prior to the first Monday of April; and, upon the order of the council, the clerk shall, at any time, furnish to it a detailed statement of all receipts and disbursements, for such periods as it may require. Any clerk refusing or neglecting to conform to the provisions of this and the next preceding section, shall be fined by the mayor, or police court as the case may be, not more than thirty dollars or less than twenty-five dollars for the use of the corporation. The provisions of section *one thousand seven hundred and fifty-six*, and *one thousand seven hundred and fifty-seven* shall not apply to any municipal corporation that publishes annually a detailed statement of the receipts and expenditures in book form or in any other printed manner. [1883, March 21: 80 v. 65; Rev. Stat. 1880; 67 v. 71, § 130.]

(1) This section is also re-enacted in § 134 of the Code, where it is made to apply to city auditors.

**Sec. 1758 R. S.** [Report to auditor of state, etc.]<sup>1</sup> He shall, on or before the first Monday of June, in each year, report to the auditor of the state<sup>2</sup> the aggregate expenses of the corporation for the preceding year, under the following heads: school, police, streets, bridges, fire department, lights, poor, salaries, and interest; and also the amount of the general corporation tax for all the preceding objects, and for any others not enumerated, and the special taxes levied and collected by the corporation for the same period: provided, that the city auditor, in any city having such officer, shall perform the duties imposed upon the clerk by this and the two preceding sections. [67 v. 71, § 131; (S. & C. 1543).]

(1) This section is re-enacted in § 134 of the Code, where it is made to apply to city auditors.

(2) **Reports to state auditor** by public accounting officers are required to be made in conformity with the uniform accounting law, passed

May 10, 1902 (95 O. L. 511) which will be found under OFFICERS in Part II. Application for forms and blanks may be made to the "Bureau of inspection and supervision of public offices," in the office of the auditor of state.

**Sec. 1759 R. S.** [Shall certify to the court election of certain officers.]<sup>1</sup> He shall certify to the court of common pleas of the



county in which the corporation is situated, the election of every officer of the corporation having power to discharge the duties of a justice of the peace, or to take the acknowledgment of deeds, or to certify depositions or affidavits to be used within the limits of such corporation, with the date of such election, and the time when such officer became legally qualified to discharge the duties of such office; which certificate shall be made within ten days after such qualification. [66 v. 171, § 132; (S. & C. 1536).]

(1) This section is also re-enacted in § 134 of the Code, where it is made to apply to city auditors.

#### FORM OF CERTIFICATE.

To the Clerk of the Court of Common Pleas, .....County, Ohio:

I, ....., Clerk of the village of ....., State of Ohio, hereby certify that on the.....day of....., 19....., .....was duly elected..... (here insert title of office) and qualified for said office on the.....day of ..... 19.....

IN WITNESS WHEREOF, I have hereunto set my hand and official seal this.....day of....., 19.....

.....  
Clerk of the village of.....

(Seal.)

**Sec. 1761 R. S. [Penalty for neglect.]<sup>1</sup>** Every clerk whose duty it shall be to make such certificate, or record the same when presented for record, who neglects or refuses to perform the duties enjoined by this chapter, shall pay to the treasurer of the corporation, for every such neglect or refusal, the sum of fifteen dollars, to be recovered in a civil action, at the suit of such corporation; and shall also be liable for all damages arising from such neglect or refusal; and any corporation clerk who neglects to make report as provided in section *seventeen hundred and fifty-eight* shall forfeit one hundred dollars, to be recovered in a civil action, with costs, in the name of the corporation, and for its use. [66 v. 172, § 134; 67 v. 71, § 131; (S. & C. 1536).]

(1) This section is also re-enacted in § 134 of the Code where it is made to apply to city auditors.

**Sec. 1762 R. S. [When clerk shall perform duties of auditor, etc.]** In corporations in which there is no city auditor, the clerk shall perform the duties of auditor, under the direction



of the council, and such other duties pertaining to his office as may be prescribed by the council;<sup>1</sup> and he shall have the charge and custody of the laws and ordinances, and the books, records, and papers of the corporation, and shall carefully keep and preserve them in his office, and shall prepare and certify all transcripts that may be required of any record or paper in his office, and shall be entitled to receive therefor the same fees as other officers for similar services. [1904, April 25, 97 v. 383; 66 v. 172, § 135.]

(1) **Appointing power.** — The council was held not to have authority to confer on the clerk the power to appoint a superintendent or janitor of a public or city hall. *Lillard v. Ampt*, 4 N. P. 305.

**Sec. 1763 R. S.** [Shall deliver books, etc., to city auditor.] Upon the creation of the office of city auditor,<sup>1</sup> the clerk shall, upon demand deliver to the incumbent of such office, when duly qualified, all the records, books, papers, vouchers, and documents in his possession pertaining to the duties of such auditor. [66 v. 172, § 136.]

(1) **This section inapplicable** except upon advancement of village to city.

### *Treasurer.*

**Sec. 202.** [Treasurer: election, term and qualification; powers and duties.] The treasurer shall be elected for a term of two years, and shall serve until his successor is elected and qualified. He shall be an elector of the corporation. He shall have all the powers, perform all the duties, and be subject to all the provisions contained in section 135 of this act with respect to the office of city treasurer, and whenever the word "city" appears in said section the word "village" shall be substituted for this purpose.<sup>1</sup>

(1) **Sections governing village treasurers.** — See note to § 135 of the Code, and see sections of the Revised Statutes re-enacted therein, which by § 202 above are made applicable to village treasurers.

### *Street Commissioner.*

**Sec. 203.** [Street commissioner: appointment, term, qualification, vacancies, duties.]<sup>1</sup> The street commissioner shall be ap-

pointed by the mayor and confirmed by council for a term of one year and shall serve until his successor is appointed and qualified. He shall be an elector of the corporation. Vacancies in the office of street commissioner shall be filled by the mayor for the unexpired term. The street commissioner, or an engineer when one is so provided for by council, under the direction of council, shall supervise the improvement and repair of streets,<sup>2</sup> avenues, alleys, lands, lanes, squares, wharves, landings, market houses, bridges, viaducts, sidewalks, sewers, drains, ditches, culverts, ship channels, streams and water courses; the lighting, sprinkling and cleaning of all public places, and shall perform such other duties, consistent with the nature of his office, as council may require, and shall have such assistants as council may provide, who shall be employed by the street commissioner and shall serve for such time and at such compensation as may be fixed by council. The marshal in any village shall be eligible to appointment as street commissioner.

(1) **Old section.**— See § 1706 R. S., repealed.

**Other statute.**— See § 1782 R. S. under OFFICERS in Part II.

(2) **Corresponding provisions applicable to cities.**— Compare §§ 140 and 141 of the Code and see notes thereunder, pp. 351, 352.

#### (B) CARE OF PARKS AND INSTITUTIONS.

**Sec. 204.** [Provision for care, supervision and management of public institutions.]<sup>1</sup> The council shall provide by resolution or ordinance for the care, supervision, and management of all public parks, baths, libraries, market houses, crematories, sewage disposal plants, houses of refuge and correction, workhouses, infirmaries, hospitals, pest houses, or any of said institutions, now owned or maintained or which may hereafter be established by any village. Provided, that whenever the council may determine to plat any of the streets as authorized by law, the council shall provide for the platting thereof.<sup>2</sup>

(1) **Corresponding provisions** therein, and see notes thereto, page **applicable to cities.**— Compare 351 *et seq.*  
§ 141 of the Code and sections of (2) **Platting commission in**  
the Revised Statutes re-enacted **cities.**— Compare § 142 of the Code.

(C) TRUSTEES OF PUBLIC AFFAIRS.

**Sec. 205.** [Board of trustees of public affairs; election, term, etc., or members; vacancies.]<sup>1</sup> In all villages in which water-works, electric light plants, artificial or natural gas plants or other similar utilities are situate at the time of the passage of this act, or which at such time are in process of construction,<sup>2</sup> or when council orders<sup>3</sup> water-works, electric light plants, natural or artificial gas plants, or other similar public utility to be constructed or to be leased, or purchased from any individual company or corporation, council shall at such time establish a board of trustees of public affairs for such village, consisting of three members who shall be residents of the village and shall be each elected for a term of two years; provided, however, that in the event that the council shall in accordance with the provisions of this act, establish such board of trustees of public affairs, the mayor of such village shall appoint the members of such board subject to confirmation by the council, who shall hold their respective offices until such time as their successors shall have been elected in accordance with the provisions hereof, and such successors shall be elected at the next regular election of municipal officers held in such village. In case of any vacancy from death, resignation or otherwise, the same shall be filled for the unexpired term by appointment by the mayor subject to confirmation by the council.

[**Organization; powers and duties.**] Said board shall organize by electing one of its number, president, and shall have authority to elect a clerk, who shall be known as the clerk of the board of trustees of public affairs. Said board shall have all



the powers and perform all the duties that are provided to be performed by the trustees of water-works in sections 2407, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434 and 2435 of the Revised Statutes of Ohio, and such other duties as may be prescribed by law or ordinance not inconsistent herewith.<sup>4</sup> [1906, April 16, 98 v. 252.]

(1) **Old sections.**— Compare old §§ 2408 R. S. and 2487 R. S., repealed.

(2) **Process of construction.**— Meaning of this term, see State *ex rel.* v. Chillicothe, 7 O. S. 355. Where the power was given to establish a board only when water-works, etc., were already constructed or “in progress of construction,” such board could not be chosen when the municipality had done no more than authorize borrowing money to construct water-works,

etc. But under the present section council may establish such board, when it *orders* water-works, etc.

(3) **Power to establish and maintain** water-works, lighting, power, heating and natural gas plants is given to all municipalities in paragraph 15 of § 7 of the Code, page 54.

(4) **Other statutes** relating to water-works not re-enacted or repealed by the Code will be found in Part II.

## FORM OF ORDINANCE ESTABLISHING BOARD OF TRUSTEES OF PUBLIC AFFAIRS.

Ordinance No.....

To establish a Board of Trustees of Public Affairs for the Village of.....

Be it ordained by the council of the village of.....,  
State of Ohio:

Sec. 1. That a board of trustees of public affairs for the village of .....consisting of three members, residents of said village, be, and hereby is, established as provided in § 205 of the act of the General Assembly passed October 22, 1902 (96 Ohio Laws, page 85), and that the members of said board shall be elected in accordance with, and shall be subject to, all the provisions of the said act.

Sec. 2. That the members of said board shall each receive \$..... per annum, payable..... and shall each give bond in the sum of \$..... in the manner provided by law.

Sec. 3. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed.....19.....

.....  
President.

Attest:

.....  
Clerk.

**Sec. 2407 R. S. [General power of council as to land, etc., for waterworks.]** The council of a city or village shall have power to take possession of any land obtained for the construction or extension of water-works, reservoirs, or the laying down of pipe, and also any water rights or easements connected with the use of water; and any land, water right, or easement so taken possession of for water-works purposes shall not be used for any other purpose, except by authority of the trustees and consent of the council. [66 v. 205, § 334; (S. & C. 1529).]

**Sec. 2409 R. S. [Salary of trustees; duties of trustees or board; duties as to electric light plants in certain villages and cities.]** The trustees shall receive a fixed salary, to be determined by the council, and the trustees or board shall manage, conduct and control the works,<sup>1</sup> furnish supplies of water, collect water-rents, and appoint all necessary officers and agents, and fix the term of office and the amount of salary of each officer and agent so appointed.<sup>2</sup> Provided, that in all villages situate in counties containing cities of the first grade of the first class and in all cities of the fourth grade of the second class<sup>3</sup> owning and operating in connection with its water-works an electric light plant for commercial or street lighting, or both, or when such plant is in progress of construction, or when council orders such plant to be constructed in connection with the water-works, it shall be the duty of such trustees, in addition to the duties above mentioned, to manage, conduct, control and operate such plant in connection with the water-works, furnish light, collect light rents from private consumers, appoint all necessary officers and agents, and fix the term of office and the amount of salary of each officer and agent so appointed, and all money collected for electric light purposes shall be deposited weekly with the treasurer of the corporation, and all money arising from a levy for light purposes, or from the proceeds of the sale of bonds issued for the purpose of constructing or improving the electric light plant, shall be paid out by the treasurer of the corporation on the order of such trustees, which order shall be countersigned by the clerk of the board of trustees; and all the provisions of

this chapter relating to the powers, duties, privileges and government of the trustees of the water-works shall, so far as applicable, control such trustees in the management of such electric light plant. [92 v. 192; 90 v. 118; 66 v. 206, § 336.]

(1) **Powers.**—Trustees may contract with a mill-owner for part of his slack water for use in water-works. *Fremont v. June*, 8 C. C. 124.

**Purchasing or leasing real estate.**—The board has not the power to purchase or lease real estate. This power is in council. *Dayton v. Cooper Co.*, 7 N. P. 495, and the municipality will not be estopped by acts of the trustees in leasing real estate. *Ib.*

**Municipality, as a riparian proprietor,** has the right to take water from a stream for the use of its water-works, and other riparian owners cannot complain, if no more is taken than required for the works. *Canton v. Shock*, 66 O. S. 19. But see *contra*, *Warder v. Springfield*, 17 B. 398. But the municipality cannot take more than a reasonable amount in supplying manufacturers with water power, and it cannot supply inhabitants outside the municipality. *Canton v. Shock*, 66 O. S. 19.

**Sections construed.**—The intention of these sections on the subject of water-works seems to be to give the board full control of the water-

works, including contracting for enlargements and improvements, and the disbursement of the water-works fund. *State v. Griffin*, 4 C. C. 156; *Cincinnati ex rel. v. Cincinnati*, 11 C. C. 309.

The board would have power to appoint experts to investigate as to the condition, sufficiency of present works, etc. *Cincinnati ex rel. v. Cincinnati*, 11 C. C. 309.

**Municipal liability.**—Municipality was held liable for injury caused by a defective service pipe leading from a main water pipe, after notice of a leak and failure to repair. *Cincinnati v. Jacob*, 18 B. 65. See generally as to municipal liability notes under § 28 of the Code, p. 116.

(2) **Removal of appointees.**—Where the board has the power to fix the terms of officers, and fixes the term as one year, "unless sooner removed," it may remove at any time without charges or a hearing. *Lawrence v. Cincinnati*, 3 Rec. 598.

(3) See note "Grades and classes under new Code" under § 1599 R. S., page 31, and see *State v. Baker*, 55 O. S. 1.

**Sec. 2410 R. S.** [By-laws, etc.] The trustees shall be authorized to make such by-laws and regulations as they may deem necessary for the safe economical, and efficient management and protection of the water-works, and such by-laws and regulations shall have the same validity as ordinances, when not repugnant thereto, or to the constitution and laws of the state. [66 v. 206, § 337.]

**Sec. 2411 R. S.** [Assessment and collection of water rents; *Cincinnati*.] For the purpose of paying the expenses of con-



ducting and managing the water-works and also for the purpose and in the manner set out and provided in section 2411a of the Revised Statutes of Ohio,<sup>1</sup> the trustees or board shall have the power to assess and collect from time to time a water-rent of sufficient amount, in such manner as they may deem most equitable, upon all tenements and premises supplied with water;<sup>2</sup> and where more than one tenant or water taker is supplied with water from one hydrant or off the same pipe, and when the assessments therefor shall not be paid when due, the board shall look directly to the owner of the property for the entire rent or so much therefor [thereof] as remains unpaid for water furnished said premises, to be collected in the same manner as other city taxes, except that in cities of the first grade of the first class,<sup>3</sup> the board of administration may provide for assessing the cost and expenses of laying or extending water mains upon the lots or lands bounding or abutting upon the streets, lanes, alleys, highways, market spaces, public landings and in commons in or along which such water mains are laid or extended by the foot front [,] according to the valuation of the same on the tax list or according to the benefits as they shall determine. [94 v. 57; 90 v. 198; 86 v. 364; 84 v. 10; Rev. Stat. of 1880; 71 v. 109, § 338.]

(1) The section here referred to is repealed by the Code. It related to bond issues for establishment of filtration plants by cities of third grade of second class.

(2) **Nature of water rent.**—Water rent is an assessment rather than a tax. If not paid, the property may be sold to pay it. Galli-

polis v. Trustees, 2 N. P. 161; Alter v. City, 56 O. S. 47.

**Power limited.**—Power to assess and collect water rents is limited by the statute conferring it. See Ramsey v. Columbus, 12 Dec. 725.

(3) See note "Grades and classes under new Code" under § 1599 R. S., p. 31, and see State v. Baker, 55 O. S. 1.

**Sec. 2412 R. S.** [Disposition of surplus.] If there is any surplus, after paying the expenses of conducting and managing the water-works, the same may be applied to the repairs, enlargement, or extension of the works, or of the reservoirs, the payment of the interest of any loan made for their construction, or for the creation of a sinking fund for the liquidation of the debt; and the amount authorized to be levied and assessed for water-works purposes shall be applied by the council to the creation of a sinking fund for the payment of the indebtedness incurred for the construction and extension of water-works, and for no other purpose whatever. [87 v. 4; 86 v. 299; Rev. Stat. 1880; 66 v. 206, § 339.]

**Sec. 2413 R. S. [Monthly reports and weekly deposits.]**

The trustees or board shall make monthly reports to the council of the receipts and disbursements of money belonging to the water-works, and an annual report of the condition of the same, which report the council may cause to be published in some newspaper of general circulation in the corporation; and all money collected <sup>1</sup> for water-works purposes shall be deposited weekly, by the collectors thereof, with the treasurer of the corporation, and one of the receipts therefor shall be by such collectors deposited with the trustees, board, or authorized agent. [66 v. 206, § 340.]

(1) **Charge for reading meters.**—Consumers cannot be charged for monthly reading of meters, in addition to the charge for water used. *Bancroft v. Wall*, 29 B. 306.

**Sec. 2414 R. S. [Money to be kept as a distinct fund.]**

Money so deposited shall be kept as a separate and distinct fund, subject to the order of the trustees or board; and all orders drawn by the trustees or board,<sup>1</sup> on the treasurer of the corporation, shall be signed by one of the trustees or board, and countersigned by the clerk of the water-works, or of the board of public works. [66 v. 206, § 341.]

(1) **Orders must show** on their face that they were issued by order of the board, or the treasurer will not be bound to honor them. *Trustees v. Corzilius*, 35 O. S. 69.

for improvement of water-works already constructed, is to be paid by order of the trustees and the treasurer must pay such order. *State v. Griffin*, 4 C. C. 156.

**Money raised by bond issue,**

**Sec. 2415 R. S. [Trustees or boards may make contracts, etc.]**

The trustees or board shall be authorized to make contracts for the building of machinery, water-works, buildings, reservoirs, and the enlargement and repair thereof, and the manufacture and laying down of pipe, and the furnishing and supplying with connections all necessary fire hydrants for fire department purposes, and keeping the same in repair, and for all other necessary purposes to the full and efficient management and construction of water-works. [70 v. 11, § 342.]

**Sec. 2416 R. S. [Annual investigation.]** The council of any corporation, in which water-works are situated, or in progress of construction, shall be authorized to appoint a committee for the investigation of all books and papers, together with all matters pertaining to the management of the water-works, at

least once a year, and oftener, if necessary, by reason of any neglect of duty, or malfeasance on the part of any officer of the works, and any officer of the works, found by such committee so offending, shall be liable to removal from office by the council. [66 v. 206 (207), § 343; (S. & C. 1529).]

**Sec. 2417 R. S. [No charge for water to extinguish fires.]** No charge shall be made by the trustees or board for supplying water for extinguishing fires or cleaning fire apparatus, or for furnishing and supplying connections and fire hydrants, and keeping the same in repair, for fire department purposes, or the cleaning of market-houses, or for the use of public school buildings, or for the use of any public buildings belonging to the corporation, or for any hospital, asylum, or other charitable institution devoted to the relief of the poor, the aged, infirm, or destitute persons, or orphan children, and in cities of the first grade of the first class the board of city commissioners may, when it deems expedient, supply water without charge to any zoological garden in or near such cities, so long as the company or association owning such garden pays no dividend to its stockholders; but any member of such board may at any time enter such garden and examine into any waste or unnecessary use of the water, and the board may, at any time, revoke the grant of such free use of water.<sup>1</sup> [70 v. 11, § 344; 76 v. 84, § 1; (S. & C. 1529).]

(1) **Validity.**—This section was held constitutional in *Gallipolis v. Trustees*, 2 N. P. 161. It was held to apply to state institutions as well as municipal. *Id.*

**Sec. 2418 R. S. [Protection of attachments, etc.]** Attachments of whatever nature made to the water-pipes, or other fixtures belonging to the water-works, and intended for public use, shall be subject to the same supervision, rules, and regulations, as are made for the protection of water-works against abuse, destruction, and inordinate or unnecessary use or waste of water, or the trustees may make general or special rules and regulations for such purpose. [66 v. 207, § 345.]

**Sec. 2419 R. S. [Rules as to contracts.]** The trustees or board, before entering into any contract for work to be done, the estimated cost of which exceeds five hundred dollars, shall cause at least two weeks' notice to be given, in one or more daily newspapers of general circulation in the corporation, that proposals will be received by the trustees, for the performing of the work specified in such notice; and the trustees shall contract



with the lowest bidder, if in their opinion he can be depended on to do the work with ability, promptness, and fidelity; and if such be not the case, the trustees may award the contract to the next lowest bidder, or decline to contract, and advertise again.<sup>1</sup> [66 v. 207, § 346; (S. & C. 1529).]

(1) **Awarding contract.**—See, generally, notes to § 143 of the Code.

**Discretion of board.**—In determining which of several bidders for pumping machinery is the lowest, the board is vested with a discretion. *Fergus v. Columbus*, 6 N. P. 82.

**Next lowest bidder** was held to mean the next qualified bidder and not to require award to the next

lowest bidder, if the board does not deem him qualified. *Fergus v. Columbus*, 6 N. P. 82; *McClain v. McKisson*, 15 C. C. 517 (affirmed 54 O. S., 673).

**Certificate of money in treasury**, held not necessary in case of such contracts, under former laws. *Fergus v. Columbus*, 6 N. P. 82.

**Sec. 2420 R. S. [Contractors must give bond, etc.]** The trustees or board shall require bond to be given,<sup>1</sup> with good and sufficient security, for the faithful performance of the work; but no member of the board of trustees, or public works, shall be such security; nor shall any trustee, or member of the board of public works, be a contractor, or in any wise, either directly or indirectly, interested in any such work to be contracted for,<sup>2</sup> provided that in case of emergency, council may, by a vote of two-thirds of all the members elected, authorize the trustees or board to enter into such contracts without advertising. [66 v. 207, § 347; (S. & C. 1530).]

(1) **Bond.**—See note (7) to § 143 of the Code, p. 374.

**contract.**—See note (3) to § 45 of the Code, page 176.

(2) **Members interested in**

**Sec. 2421 R. S. [Extension of aqueducts, etc., beyond corporation limits; mains and water-pipes extended, at expense of individuals, under supervision of water-works officer.]** The trustees or board or council of any corporation owning water-works, may, on the written request of any number of citizens living outside of the limits thereof, extend, construct, lay down and maintain aqueduct and water-pipes to any distance outside the corporation limits, not exceeding four miles, and for this purpose shall have the right to make use of such of the public streets, roads, alleys and public grounds as may be necessary therefor. And when any person or persons, at his or their expense have heretofore or may hereafter lay down and extend

any mains and water-pipes beyond the limits of such corporation, as herein provided, and such corporation has, by resolution of its trustees of water-works, council, board of control or administration, or city commissioners, or either of them, authorized its superintendent, or other officer of the water-works, to superintend or supervise the laying and extension of such mains and water-pipes, such corporation is hereby authorized and required to furnish water to the residents and property holders on the line of such mains and water-pipes, but subject to the same rules and regulations except as to rates, which shall not exceed those charged within the corporation by more than one-tenth thereof, that such corporation furnishes water to its own citizens; and all ordinances except those relative to taxation or assessment, resolutions, rules and regulations relative to the construction, maintenance and operation of water-works, mains, hydrants, service-pipes and connections, and the protection thereof, now in force and operation on the municipality, or which may hereafter be passed and adopted, shall operate in like manner in the territory outside of the municipality when such extension has been made, and for the enforcement of the same the jurisdiction of the mayor and police shall extend into and over said territory. Said corporation shall take full charge and control of said mains and water-pipes, keep the same in repair at its own expense, and in the event of annexation to the corporation of the territory wherein such mains and water-pipes have been laid, such corporation shall pay to such person or persons a just compensation therefor, and shall thereupon become the owner thereof. [90 v. 35; 66 v. 207, § 348; (S. & S. 866).]

**Sec. 2422 R. S. [Construction and regulation thereof.]** Such aqueducts and pipes shall be so constructed and laid as not to interfere, unnecessarily with the use of such streets, roads, alleys and public grounds, as public highways, and public grounds; and the corporation so extending and establishing any part of its water-works outside of its limits, shall have the same power and jurisdiction to prevent or punish any pollution of, or injury to, the water so conveyed, or any injury to the works, or any portion thereof, as they may have within the limits of the corporation. [66 v. 208, § 349.]

**Sec. 2423 R. S. [Water-works in contiguous cities or villages.]** Any city or village owning water-works, whose territory is contiguous to that of another city or village, may with the assent of such other city or village, establish and maintain such portion of its water-works, as it deems advisable, within the limits

of such other city or village, and shall have the right to make use of such of the public streets, alleys, and public grounds of such other city or village as shall be necessary, for the purpose of constructing, laying down, and maintaining all such aqueducts and water-pipes as shall be required in connection with such water-works, for the conveyance of water along and across such streets, alleys, and public grounds. [66 v. 208, § 350; (S. & C. 1538).]

**Sec. 2425 R. S. [Authority to supply contiguous cities or villages with water.]** Any city or village which has established, or hereafter establishes water-works, may enter into a contract with any contiguous city or village for the supply of the latter with water, upon such terms as shall be mutually agreed upon by the councils of the respective municipal corporations; and any city or village which has water-works, is hereby authorized and empowered to dispose of any surplus water, for manufacturing or other purposes, by lease or otherwise, upon such terms as may be agreed upon by the board of trustees of the water-works, or public works, and approved by the council of such city or village; and all moneys received for such surplus water, shall be applied to the payment of the principal and interest of the bonds issued for the construction of such water-works, or other expenses incident to the maintenance of the water-works; provided, that no lease shall be made for a longer term than twenty years.<sup>1</sup> [69 v. 25, § 352 (S. & C. 1539.)]

(1) **Villages not contiguous** clause of this section. *Wright v. Kennedy Heights*, 1 C. C. (N. S.) 195; 25 C. C. 409.  
cannot be contracted with for water  
supply under either first or second

**Sec. 2426 R. S. [Cost thereof, how raised.]** The amount to be paid for such supply, shall be raised by such city or village in the manner provided for the payment of the expense of conducting and managing water-works constructed wholly by a city or village; and the amount so received by the city or village furnishing such supply, shall be applied to the payment of the interest on the sum borrowed for the construction of such water-works, or to defray the expense of their management, as the board of trustees for water-works, or board of public works, shall direct. [66 v. 208, § 353.]

**Sec. 2427 R. S. [Works to be joint property.]** Upon the annexation of one municipal corporation to another, the water-works theretofore construed by either, shall thereby become the joint property of the united corporation, and shall thereafter be managed by the board of trustees of the corporation to which such annexation is made, or board of public works, as the case may be. [66 v. 208, § 354; (S. & C. 1539).]

**Sec. 2428 R. S. [Termination of contract upon annexation, etc.]** Any contract entered into by one municipal corporation



for the supply of water to the other, as hereinbefore provided, shall be terminated by such annexation; and so much of the debt incurred by either, in the construction of water-works, as remains unpaid, shall thereafter be a charge upon the united corporation, to the same extent that the separate debt of either, incurred as aforesaid, was, before such union, a charge upon the corporation which constructed the same. [66 v. 209, § 355; (S. & C. 1539).]

**Sec. 2429 R. S.** [Tax for payment of certain interest.] For the purpose of paying the interest on the money borrowed for the erection and completion of water-works, during the erection and completion thereof, and before they shall have been put in operation, a tax of sufficient amount shall be assessed and collected, each and every year, in the usual manner of levying and collecting taxes in the corporation upon all the taxable property thereof. [66 v. 209, § 356; (S. & C. 1527).]

**Sec. 2430 R. S.** [Tax for payment of interest on loans; Toledo.] For the purpose of paying the interest on any loan which any city or village may heretofore have made, or may hereafter make, for the erection or extension of water-works, and after they shall have been put in operation, and for the building of machinery, a tax of sufficient amount may be assessed and collected, in addition to the amount now authorized by law, by the common council, in each year, upon all the taxable property, both real and personal, in said city or village, provided that in cities of the third grade of the first class <sup>1</sup> one-fourth of the annual interest upon any such loan or loans shall be considered and treated as expenses of operation, and shall be paid from the revenues derived from such water-works, and a tax shall be levied for only three-fourths of said interest. [90 v. 326; 88 v. 153; 66 v. 209, § 357.]

(1) See note "Grades and classes under new Code," under § 1599 R. S., page 31, and see State v. Baker, 55 O. S. 1.

**Sec. 2431 R. S.** [Tax a lien upon property.] The tax, when levied and assessed, shall be a lien upon the property upon which the same is levied, and a charge against the owners thereof, and shall be certified to the auditor of the county, and placed upon the tax-list in a separate column thereof, and collected as other taxes; and the same shall be paid to, and be under the control of, the trustees of the water-works, or board of public works, as the case may be. [66 v. 209, § 358.]

**Sec. 2432 R. S.** [Laying pipes in highway.] The council, or the board of administration in cities of the first grade of the

first class, may prescribe, by ordinance, or said board of administration may provide by resolution for the laying down of water-pipes in all highways about to be paved, macadamized or otherwise permanently improved, and for the assessment of the cost and expense thereof upon the lots or parcels of land adjoining or abutting upon the highways in which the same are laid; but in no case, except as a sanitary measure, shall the council require any house connections to be built further from the main pipe than the outer line of the curbstone. [90 v. 198; 66 v. 209, § 359.]

**Sec. 2433 R. S. [Criminal jurisdiction; territorial limits.]** The jurisdiction of any municipal corporation to prevent the pollution of its water supply and to provide penalty therefor, shall extend twenty miles beyond the corporation limits. Whoever pollutes any running stream, the water of which is used for domestic purposes by any municipality by putting therein any putrid or offensive substance, (other than fresh or salt water), injurious to health shall be guilty of a misdemeanor, which shall be punishable by a fine of not less than five or more than five hundred dollars. It shall be the duty of the board of public service or board of trustees of public affairs of any municipal corporation to enforce the provisions of this section. [97 v. 135; 66 v. 209.]

**Sec. 2434 R. S. [Municipalities, except cities of the first grade, first class, empowered to contract for a water supply; contract to be submitted to a vote of electors.]** Any municipal corporation, except cities of the first grade of the first class<sup>1</sup> shall have power to contract with any individual or individuals, or any other incorporated company for supplying water for fire purposes, or for cisterns, reservoirs, streets, squares, and other public places within the corporate limits, or for the purpose of supplying the citizens of such municipal corporation with water for such time, and upon such terms as may be agreed upon. Provided, that no such contract shall be executed or binding upon any such municipal corporation until the same shall have been ratified by a vote of the electors thereof, at a special or general election, and such municipal corporation shall have the same power to protect any such water supply and prevent the pollution thereof as though such water-works were owned by said municipal corporation.<sup>2</sup> [1885, January 29: 82 v. 11; 80 v. 71; 78 v. 42; Rev. Stat. 1880; 71 v. 93, § 54.]

(1) See note 6, p. 31.

of such a contract. *Defiance v.*

(2) **Certificate of money in treasury** held not necessary in case *Council, 23 C. C. 96, (reversed on other grounds, 68 O. S. 520).*

**Sec. 2435 R. S. [Limitation in creating debts.]** Except as otherwise provided in this title, the board of public works, in cities of the first grade of the first class<sup>1</sup> shall not hereafter be per-

mitted to create any debt for the prosecution of work upon the water-works, beyond the yearly net income of the water-works, nor make any contract in any year that can not be met and paid from the income of the water-works for the year; and all debts created in violation of these provisions shall be absolutely void; nor shall the council create any debt, or borrow any money for the use of the water-works, except as authorized in this title. [72 v. 87, § 3.]

(1) See note to § 2430 R. S., p. 467.

(D) POLICE<sup>1</sup> AND FIRE DEPARTMENTS.

**Sec. 206.** [Marshal: election, term, qualification, powers and duties; deputy marshal, policemen, etc.; appointment, compensation, etc.]<sup>2</sup> The marshal shall be elected for a term of two years, shall serve until his successor is elected and qualified and shall be an elector of the corporation. He shall be the peace officer of the village, and the executive head, under the mayor, of any police force now or hereafter established. He shall have such powers and perform such duties as are conferred and required in sections 1848, 1849, 1850, 1851, 1852, 1853 and 1854, of the Revised Statutes of Ohio. Council may provide for such deputy marshals,<sup>3</sup> policemen, night watchmen and special policemen as it may deem best, and fix their duties, periods of service, bonds and compensation, and they shall be appointed by the mayor, and confirmed by the council and may be removed by him for cause which shall be stated in writing to council. The marshal and the deputy marshals, policemen, or night watchman under him, shall have such powers as are now conferred by law upon police officers in all villages of the state, and such other powers, not inconsistent with the nature of their offices, as may be conferred by ordinance.

(1) **Power to organize and maintain police department** is conferred upon all municipalities in paragraph 14 of § 7 of the Code, page 53.

(2) **Old section** 1847 R. S., repealed; and compare old § 2023 R. S., repealed.

(3) **Appointment of deputy marshals.**—Under former statutes

where the mayor made appointments of night watchmen and policemen, it was held he could not appoint until authorized by ordinance of council to do so. *Schwegman v. St. Bernard*, 12 Dec. 9.

**Duties of deputy marshals.**—For construction of §§ 1848 and 1849 R. S. and the powers and duties of deputy marshals in villages,



see *Schwegman v. St. Bernard*, 12 Dec. 9.

**Certificate of money in treasury**, necessary to meet salaries, was held necessary before such offices could be provided for or appoint-

ments made. *Uhrig v. Reading*, 8 N. P. 573.

**Powers and duties of deputies** are same as those of marshals. *Uhrig v. Reading*, 8 N. P. 573.

**Sec. 1848 R. S.** [Duties of marshal.] He shall execute and return all writs and process to him directed <sup>1</sup> by the mayor, and shall, by himself or deputy, attend on the sittings of said court, to execute the orders and process thereof, and to preserve order therein,<sup>2</sup> and his jurisdiction, and that of his deputies, in the execution of all such writs and process, and in criminal cases, and in all cases of a violation of the ordinances of the corporation, shall be co-extensive with the county, and in civil cases shall be co-extensive with the jurisdiction of the mayor in the same. [71 v. 76, § 141.]

(1) **Reward for arrest** offered by person from whom property was stolen, cannot be claimed by officer arresting under magistrate's warrant given him for the purpose. *Gillmore v. Lewis*, 12 O. 281.

Officer going outside the state and arresting accused under a magistrate's warrant, is acting beyond his powers, and cannot claim compensa-

tion for the service. *Smith v. Commissioners*, 9 O. 25.

(2) **Duties in court.**—The fact that the marshal arrested the accused under a warrant, does not disqualify the marshal to perform his duties in the selection of the jury to try the cause. *Mineral City v. Render*, 51 O. S. 122.

**Sec. 1849 R. S.** [To suppress riots, etc.] He shall suppress all riots, disturbances, and breaches of the peace, and to that end may call upon the citizens to aid him; he shall arrest all disorderly persons in the corporation, and pursue and arrest any person fleeing from justice in any part of the state; he shall arrest <sup>1</sup> any person in the act of committing any offense against the laws of the state, or the ordinances of the corporation, and forthwith bring such person before the mayor, or other competent authority, for examination or trial; and he shall receive and execute any proper authority for the arrest and detention of criminals fleeing or escaping from other places or states. [66 v. 173, § 142.]

(1) **Arrest without warrant.**—See § 7129 R. S., providing for arrest without warrant; § 1849 must be construed with § 7129. *State v. Lewis*, 50 O. S. 179.

In cases of breach of the peace, arrest without warrant cannot be made unless the offense was committed in the presence of the officer. *Ib.*

Where the officer is justified in making arrest without warrant it is not necessary to the lawfulness of the arrest that the offender be informed of the cause of the arrest, where the officer and cause of arrest were known to him. *Wolf v. State*, 19 O. S. 248.

An officer acting *bona fide* may arrest without warrant one carrying concealed weapons, if the information leading to the arrest would justify a prudent man in so acting. *Ballard v. State*, 43 O. S. 340.

Officer without warrant cannot arrest on mere suspicion that the person arrested is a deserter from the army. *Kendall v. Scheve*, 3 C. C. 526. But a well-grounded suspicion would be enough. *State v. West*, 3 O. S. 509.

The officer must believe and have

reasonable cause to believe that the person arrested was guilty of the offense. *Burch v. Franklin*, 7 N. P. 155.

**Violating city ordinances.**—Council may order arrest without warrant of persons violating city ordinances, if in view of officer. *White v. Kent*, 11 O. S. 550.

**Holding until warrant obtained.**—Person arrested without warrant can be detained only as long as is reasonably required to secure warrant. *Leger v. Warren*, 62 O. S. 500. As to reasonableness of delay, see *Raitz v. Green*, 13 C. C. 455.

**Fugitive from another state** may be held a reasonable time until requisition papers can be issued. *Rea v. Smith*, 2 Handy, 193.

**Sec. 1850 R. S. [Powers, responsibilities, fees, etc.]** He shall have, in the discharge of his proper duties, like powers, be subject to like responsibilities, and shall receive the same fees, as sheriffs and constables in similar cases, for services actually performed by himself or his deputies, and such additional compensation as the council may prescribe; but in no case shall he receive any fees or compensation for services rendered by any watchman or other officer, nor shall he receive for guarding, safe keeping, or conducting into the mayor's or police court, any person arrested by himself or deputies, or by any other officer, a greater compensation than twenty cents. [66 v. 173, § 143.]

**Sec. 1851 R. S. [Disposition of fines, etc.]** All fees, costs, fines, and penalties by him collected, shall immediately be paid over to the mayor, and he shall report to the council monthly the amount thereof, and from whence and for what purpose collected, and when paid over. [66 v. 173, § 144.]

**Sec. 1852 R. S. [Disposition and record of stolen property.]** All stolen or other property taken by the members of the police force, in cities of the second class, shall be delivered to the marshal, or officer performing like duties, who shall, in a book to be kept for that purpose, keep a record of the same, together with the name of the person from whom taken, the probable value of the article, and such other information as may seem to him necessary. [74 v. 75, § 1.]

**Sec. 1853 R. S.** [To be held subject to order of mayor.] Such officer shall permit all persons to examine such record at their pleasure; he shall hold all such goods or property subject to the order of the mayor, and dispose of the same as the mayor may direct; and when any such goods or property are sold by him, he shall forthwith pay all sums arising from such sale into the city treasury. [74 v. 75, § 1.]

**Sec. 1854 R. S.** [Report to mayor in regard to stolen property.] Such officer shall, every thirty days, deliver to the mayor of his city a statement, in writing, of all articles of goods or property which have come into his hands by virtue of his office, which shall show what disposition has been made of the same; which statement must be sworn to by such officer, who is hereby made responsible to the mayor for all such articles, or their true value. [74 v. 75, § 2.]

**Sec. 207.** [Fire department: organization, etc.]<sup>1</sup> In any village which now maintains, or may hereafter establish, a fire department, the head of said department shall be a fire chief, an elector of the corporation, who shall be appointed by the mayor, for a term of two years.<sup>2</sup> Council may provide for the employment of such firemen as it may deem best, and fix their compensation, or for the services of volunteer firemen. All firemen, other than volunteers, shall be appointed by the mayor for terms of one year, by and with the advice and consent of council. In the management of the fire department and the prevention of fires, council shall have all the powers conferred by general law in sections 2470, 2471, 2472 and 2473, of the Revised Statutes of Ohio, and the fire chief shall have all the powers conferred upon a fire engineer in sections 2474 and 2475, of the Revised Statutes of Ohio.

(1) **Power to organize and maintain fire department** is conferred upon all municipalities in paragraph 14 of § 7 of the Code, page 53.

Power of the mayor under former statutes to remove fire chief and declare a vacancy. See *State ex rel. v. Bryson*, 44 O. S. 457; *State v. Heinmiller*, 38 O. S. 101.

(2) **Removal of fire chief.**—

**Sec. 2470 R. S.** [Powers of council as to fire department.] The council of any city or village shall have power to estab-



lish all necessary regulations to guard against the occurrence of fires, and protect the property and lives of the citizens against damage and accidents resulting therefrom; and for this purpose, to establish and maintain a fire department, and provide for the establishment and organization of fire engine and hose companies, and provide such by-laws and regulations for the government of such companies as may be deemed necessary and proper: provided, that no active volunteer fireman, or one who has served five years consecutively as a volunteer fireman, shall be required to serve on juries, or perform military duty in time of peace, or labor on the highways.<sup>1</sup> [67 v. 76, § 326; 69 v. 54, § 1.]

(1) **Municipal liability.**—See note (1) under § 151 of the Code, page 389.

**Sec. 2471 R. S.** [To purchase fire engines, etc.] The council may also purchase, for its own use, or for the use of such companies, all necessary fire engines, either steam or hand, hose carriages and hose, and all such other apparatus and instruments as shall be deemed necessary to the extinguishment of fires, and establish lines of fire alarm telegraph within the limits of the corporation.<sup>1</sup> [66 v. 204, § 327.]

(1) **Municipal liability** for failure to provide necessary agencies for extinguishing fires, see notes under § 151 of the Code, page 389.

**Sec. 2472 R. S.** [To erect necessary buildings, etc.] The council may also provide or erect all necessary and suitable buildings, containing rooms for fire engines, hose carriages, fire apparatus, and instruments, and for the meetings of the fire and hose companies.<sup>1</sup> [66 v. 204, § 328.]

(1) **Not subject to levy on execution.**—A building erected for a fire engine house, but rented by the city for other purposes, is not subject to levy under a judgment against the city. Cincinnati v. Frost, Stearns & Co., 5 B. 684.

**Sec. 2473 R. S.** [To regulate the erection of structures, etc.] The council shall have power to regulate the erection of houses and business structures and, on the petition of the owners of not less than two-thirds of the ground included in any square, or half-square, prohibit the erection on any such square, or half-square, of any building, or addition to any building more than ten feet high, unless the outer walls be made of iron, stone, brick and mortar, or of some of them, and to provide for the removal of any building or additions erected contrary to such

prohibition;<sup>1</sup> and in cities of the first class<sup>2</sup> the council may prohibit, within such limits as it may deem proper, the erection of buildings, unless the outer walls be constructed of iron, brick and mortar, or stone, brick and mortar. [91 v. 124; 66 v. 204, §§ 329, 333.]

(1) **Buildings already erected** before the passage of the ordinance may be moved from one part of the prescribed limits to another. *Cleveland v. Lenze*, 27 O. S. 383.

(2) See notes "Grades and classes under new Code" under § 1599 R. S., page 31.

### FORM OF PETITION FOR REGULATION OF ERECTION OF BUILDINGS.

To the council of the village of....., State of Ohio:

The undersigned, being the owners of two-thirds of the ground included in the square [or half-square] bounded as follows: (here insert street boundaries of square or half square), in the village of....., hereby petition your honorable body to pass the proper legislation to prohibit the erection on such square [or half square] of any building or addition to any building more than ten feet high, unless the outer walls be made of iron, stone, brick or mortar, or of some of them, and to provide for the removal of any buildings or additions erected contrary to such prohibition.

....., owner of.....feet front.

....., owner of.....feet front.

etc., etc.

### FORM OF ORDINANCE TO REGULATE THE ERECTION OF BUILDINGS.

Ordinance No.....

To regulate the erection of buildings on the square bounded.....

Be it ordained by the council of the village of....., State of Ohio:

Sec. 1. That in pursuance of a petition by the owners of two-thirds of the ground included in the square [or half square] bounded by (here insert boundaries) presented to council for that purpose and the power vested in the council by law, the erection on said square [or half square] of any building or addition to any building, more than ten feet high, unless the outer walls be made of iron, stone, brick, or mortar, or of some of them, be and the same is hereby prohibited.

Sec. 2. That any building or buildings or additions to any building erected contrary to the provisions of this ordinance shall, after thirty days' notice to the owner to remove the same, be removed by the fire chief and the expense of such removal charged to the owner.

Sec. 3. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed.....19.....

Mayor.

Attest:

Clerk.

**Sec. 2474 R. S.** [To invest fire engineer with power, etc.] The council may invest the fire engineer,<sup>1</sup> or any other officer of the fire or police department, with the power, and impose on him the duty, to be present at all fires, investigate the cause thereof, examine witnesses, and compel their attendance and production of books and papers, and to do and perform all such other acts as may be necessary to the effective discharge of such duties. [66 v. 205, § 330.]

(1) This officer would now be the fire chief.

**Sec. 2475 R. S.** [Engineer, etc., may make arrests, etc.] Such officer shall have power to administer oaths, make arrests, and enter, for the purpose of examination, any building which, in his opinion, is in danger from fire; and he shall report his proceedings to the council at such times as may be required.<sup>1</sup> [66 v. 205, § 331.]

(1) Section cited in State *ex rel.* v. Bryson, 44 O. S. 457, 469.

### 3. JUDICIAL.

**Sec. 208.** [Police court.]<sup>1</sup> In every village where a police court is now established by law, whether by general acts or by acts designating the village by grade or class or otherwise said police court shall continue to exercise all powers and functions conferred by said general or special acts, and shall be known as the police court of the village in which the same now exists.<sup>2</sup>

(1) See notes to § 190 of the Code, page 441.

(2) Statutes relating to police and mayor's courts, referred to in

§§ 208, 209 and 210 of the Code, and not repealed, will be found under title JUDICIAL in Part II.



**Sec. 209. [Jurisdiction thereof; how judge, clerk, etc., chosen.]**

The police court of each village as heretofore established and now existing shall have the jurisdiction conferred in any general or special act creating or governing the same, and the mayor as judge of said court and the clerk, assistant clerks and all other officers and employes of said court, shall be elected or appointed and shall continue to exercise their powers and duties in the manner provided in said existing laws.<sup>1</sup>

(1) See notes to § 191 of the Code, page 442.

**Sec. 210. [Certain acts not repealed.]** All acts or parts of acts providing for such police courts, or regulating the procedure therein, including an act entitled, "An act to amend section 6565 of the Revised Statutes of Ohio," passed April 10, 1902, shall be and remain in full force and effect.<sup>1</sup>

(1) See note to § 192 of the Code, page 443.

## V

## MISCELLANEOUS PROVISIONS

## 1. SAVING OF RIGHTS UNDER PREVIOUS LAWS.

**Sec. 211.** [Municipalities created under this act shall succeed to all the rights and liabilities of original municipality; new remedies are cumulative; municipal boundaries.]<sup>1</sup> All rights and property which are vested<sup>2</sup> in any municipal corporation under its former organization, shall be deemed vested in the same municipal corporation under the organization provided by this act; and no rights or liabilities, either in favor of or against such corporation, existing at the time of the taking effect of this act, and no suit, prosecution or proceeding shall be in any manner affected by such change, but the same shall stand or proceed as if no such change had been made; provided, that where a different remedy is given in this act, which can be made applicable to any rights existing at the time it goes into effect, such remedy shall be deemed cumulative to those already provided, and may be used accordingly. The boundaries of all municipal corporations as now established pursuant to any special or general acts shall be and remain as the same are now established, until such time as the same shall be changed in accordance with the provisions of this act.

(1) **Old sections** 1538 and 1539 R. S., repealed, saving clauses under the Code of 1869.

(2) **Vested rights and property remaining.**—The steps leading to an assessment for street improve-

ment were held to constitute a proceeding, and when pending at the time the law under which they were taken was repealed, they remain valid as the basis of assessment or re-assessment. *Raymond v. Cleve-*

land, 42 O. S. 522. *Cincinnati v. Seasongood*, 46 O. S. 296.

Where a contract for improvement has been made and the work commenced under an act of the legislature, the right to make an assessment to pay the costs will not be affected by repeal of the act, where there is a saving clause such as in the above section. *Corry v. Gaynor*, 22 O. S. 584; *Hubbard v. Norton*, 28 O. S. 116; and see *Goodale v. Fennell*, 27 O. S. 426.

Whether a section such as this would have any application to improvements begun after the act took effect, see *Toledo v. Toledo*, 22 B. 131, 135.

#### **Municipal corporations not re-**

**created.**—The Code of 1852 was held not to have annihilated and re-created pre-existing municipal corporations of the State, but to have re-organized and continued them, leaving their corporate identity unaffected. *Fosdick v. Perrysburg*, 14 O. S. 472.

Under the present Constitution the legislature can neither create a corporation by special act nor confer additional corporate power by special act on those already existing any more than it can do these things in respect to private corporations. *State v. Cincinnati*, 20 O. S. 18; *State v. Cincinnati*, 23 O. S. 445; *State v. Mitchell*, 31 O. S. 592.

#### **Sec. 212. [How words of enactment or repeal to be construed.]**

Wherever existing statutes are expressly made to remain in effect by this act, whether by sectional numbers or by title, division and chapter, such statutes, with all other acts amendatory thereof or supplementary thereto, shall be of the same force and effect as if fully set forth and incorporated herein; wherever existing statutes are expressly repealed by this act, such repeal shall apply to all acts amendatory thereof or supplementary thereto; all sections, subsections, titles, divisions and chapters referred to in this act shall be those contained in the third edition of Bates' Annotated Ohio Statutes, as approved by the act of April 23, 1902 (95 O. L., 241), and this act shall be a part of title XII of said statutes.<sup>1</sup>

(1) **Construction of Code.**—“A code of statutes relating to one subject is presumed to be governed by one spirit and policy and intended to be consistent and harmonious, and all of the several sections are to be considered in order to arrive at the meaning of any part, unless a contrary intent is clearly mani-

fest.” *Cincinnati v. Guckenberger*, 60 O. S., 353.

**Effect of Codification and Revision.**—The revision of all statutes on a particular subject presumably does not change the construction of the original, although the language has been changed. *State ex rel. v. Shelby Co.*, 36 O. S.



326; *Allen v. Russell*, 39 O. S. 336; *State ex rel. v. Auditor*, 43 O. S. 311, 315; *State ex rel. v. Stockley*, 45 O. S., 304, 308. But a clause added in a revision which qualifies the former operation of a statute must be given effect. *Collins v. Millen*, 57 O. S. 289. See also *Giffin v. Brooks*, 3 C. C. 110.

**Mere change in 'phraseology** in a revision does not change former construction unless evidently intended. *Ash v. Ash*, 9 O. S. 383; *Tyler v. Winslow*, 15 O. S. 364, 368; *Hamilton v. Stbt. R. B. Hamilton*, 16 O. S. 428, 432; *Stannard v. Case*, 40 O. S. 211, 214; *Conger v. Barker*, 11 O. S. 1; *Boley v. Oh. L. Ins. and Trust Co.*, 12 O. S. 139, 144; *Dutoit v. Doyle*, 16 O. S. 400, 405; *Brower v. Hunt*, 18 O. S. 311, 338.

**Amendment of act incorporated.**—See *Brigel v. Starbuck*, 34 O. S. 280; *Stall v. Macalester*, 9 O. 19; *Clarke v. Thomas*, 34 O. S. 46.

**Repeal of act incorporated.**—See *Ludlow v. Johnston*, 3 O. 553.

**Amendatory and supplementary**

**acts.**—*Ham v. Kunzi*, 56 O. S. 531; *Fidelity, etc., Co. v. Hahn*, 33 R. 286; *Cincinnati v. Taft*, 63 O. S. 141; *State v. Commr's*, 16 C. C. 218 (affirmed 57 O. S. 661).

**Former law invoked to remove doubt.**—*State ex rel. v. Brewster*, 44 O. S. 249, 252; *Heck v. State*, 44 O. S. 536, 538.

**Repeals by implication.**—Where a law revises the entire subject matter of a former act and is evidently a substitute for it, the earlier act must be regarded as repealed by implication. *Shelby Co. v. Frego*, 26 O. S. 488, 491; *Lorain Plank Road v. Cotton*, 12 O. S. 263; *Moore v. Vance*, 1 O. 1, 10.

And where a later statute flatly contradicts an earlier one, the earlier one is repealed by implication. *Work v. Massie*, 6 O. 503.

But where the two statutes can well stand together there can be no repeal by implication. See *State v. Davis*, 23 O. S. 434.

Repeal of repealing act does not revive original act, § 78 R. S.

**Sec. 213.** [Certain officers and employes shall continue to act until displaced under provisions of this act.]<sup>1</sup> All officers elected by the people or appointed by any authority, and all employes under any boards or officers in any municipal corporation, and all officers or employes in any educational, charitable, benevolent, penal or reformatory institution in any such corporation, now serving as such, shall remain in their respective offices and employments and continue to perform the several duties thereof under existing laws, and receive the compensation therefor until their successors are chosen or appointed and qualified or until removed by the proper authority in accordance with the provisions of this act.<sup>2</sup>

(1) **Old section.**—Compare § 1542 R. S. repealed.

(2) **In what cases.**—An officer does not hold over unless his

successor is provided for. *McHugh v. Cincinnati*, 1 C. S. C. R. 145.

An officer removed for misconduct does not hold over. *State ex rel. v. Hawkins*, 44 O. S. 98.

A clerk of board of water works trustees at time of enactment of new Code, would continue in employment until removed by board of public service. *Hutchinson v. Lima*, 27 C. C. 545; 6 C. C. (N. S.) 529.

Where a new code creates a new office, but makes no provision for filling it, it simply creates a vacancy to be filled until the next general election. *State v. Cook*, 20 O. S. 252.

**When section applicable.**—This general provision does not control, when specific provision is otherwise made, as in case of police and fire departments. *State ex rel. v. Hall*, 25 C. C. 361; 2 C. C. N. S.) 237.

**Character of holding.**—Where an officer is holding over there is no vacancy during the period of such holding and the incumbent is a *de jure* officer. *State ex rel. v. Howe*, 25 O. S. 588.

See also *State ex rel. v. Killits*, 8 C. C. 30.

Officer continuing to act as such in good faith, though after the office is abolished, cannot be regarded as criminally usurping office. *Kreidler v. State*, 24 O. S. 22.

**Salary.**—In the case of an officer whose duties were specific and limited and not continuous during the year, the annual salary must be apportioned, not by the time of service but by the duties actually performed and may be wholly earned at the time the office was abolished. *Ex parte Lawrence*, 1 O. S. 431.

The prohibition against affecting the salary of an officer during his existing term does not apply to an officer holding over. *Woehler v. Toledo*, 6 B. 282.

**De facto governments** of municipalities prior to first Monday in May, 1903, see *Citizens' Light & Heat Co. v. Springfield*, 47 B. 710; *Friedman v. Cincinnati*, 13 Dec. 404; *Columbus v. Federal Gas & Fuel Co.*, 14 Dec. 261 (aff'd Cir. Ct. Meh. 20, 1904).

**Sec. 214.** [By-laws, ordinances and resolutions heretofore passed or adopted shall remain in force.]<sup>1</sup> All by-laws, ordinances and resolutions heretofore lawfully passed or adopted by the council, board of legislation or other legislative body in any municipal corporation, and not inconsistent with this act, shall remain in force until duly altered or repealed.<sup>2</sup>

(1) **Old section.**—Compare old § 1543 R. S. repealed.

(2) **Ordinances continuing in force.**—Only such ordinances would continue in force, as, if passed under the new Code, would be authorized by its provisions. See *Neff v. Bates*, 25 O. S. 169; *Hubbard v. Norton*, 28 O. S. 116.

On the other hand, an ordinance formerly passed but not authorized by the laws then in force would not be valid, even though authorized by the new Code, notwithstanding the provision continuing in force all former ordinances not inconsistent

with the new Code. *Cotter v. Doty*, 5 O. 393, 398.

An ordinance that was unconstitutional would, of course, not be continued in force. See *Zanesville v. Auditor*, 5 O. S. 589.

An ordinance fixing a salary would continue in force, if the authority passing the ordinance has the power under the new Code and the salary does not exceed the maximum therein provided, even though the law under which the ordinance was passed is repealed by the Code. *Moore v. Cincinnati*, 26 O. S. 582.

An ordinance providing for the

annexation of contiguous territory, a provision such as that in the not inconsistent with the new Code, above section. *Croll v. Franklin*, 40 was held to continue in force, under O. S. 340.

## 2. CERTAIN ACTS FOR PENDING IMPROVEMENTS.

**Sec. 215.** [Certain acts not to be construed as altered, amended or repealed.] Nothing in this act shall be construed to alter, repeal or amend an act entitled, "An act to create a board of supervision in the erection simultaneously of public, municipal and county buildings," passed May 6, 1902, or sections 2435-1, 2435-2, 2435-3, 2435-4, 2435-5, 2435-6, 2435-7, 2435-9, 2435-10, 2435-11, 2435-12, 2435-13, 2435-14, 2435-15, 2435-16, 2435-17 and 2435-18 of the Revised Statutes of Ohio,<sup>1</sup> nor any other acts or parts of acts authorizing public improvements or the enlargement or extension of waterworks, in any municipality by a board of waterworks trustees heretofore established by law, having authority to make enlargements and extensions of waterworks and having such enlargements and extensions in progress of construction; but in all such cases said boards of supervision in the erection simultaneously of public municipal and county buildings, or commissioners of waterworks or boards of waterworks trustees shall continue in office and perform all of the functions and duties and exercise all of the powers now possessed by them until the completion of such improvements in progress of construction, and thereupon the works so completed shall be turned over to the appropriate authority of the municipality.<sup>2</sup>

(1) The act and sections mentioned here will be found in Part by a general municipal Code, see *State v. Davis*, 23 O. S. 434; *Fosdick v. Perrysburg*, 14 O. S. 472.

### (2) Special acts not repealed

**Sec. 216.** [Board of supervision in the erection of public, municipal or county buildings; appointment of by board of public service; powers of such board.] Whenever any city, or the county in which the city is located, has in contemplation, or in



process of construction, buildings for public, municipal or county purposes, within the boundaries of such city, the director of public service may provide for the employment of three persons, to be named by them, of whom at least two shall be architects, and who shall be employed at a salary not exceeding five thousand (\$5,000) per annum each, to be fixed by the directors of public service, and paid by the city from the general fund. Such persons shall have, under the supervision of the directors of public service, control of the location of all public, municipal or county buildings, to be erected upon the ground acquired within the limits of the city, and of the size, height, style and general appearance of such buildings and all plans and specifications for the erection of the buildings aforesaid shall be submitted for approval to the persons herein authorized to be employed and approved by them before they are adopted by the authorities engaged in the construction thereof;

**[Commission for the erection of city hall; appointment of by board of public service.]** provided, further, that whenever any city has in contemplation or in process of construction, or furnishing, a city hall, the director of public service may provide for the employment of five citizens of said city, to be named by them, not more than three of whom shall belong to the same political party, who shall constitute a commission under the supervision and directions of the directors of public service, for procuring the necessary land for the construction and furnishing of such city hall. Said commissioners shall have power, subject to the approval of the directors of public service, to acquire, in the name of the city, by purchase or appropriation, land for city hall purposes, and shall have power to employ architects, and approve plans and specifications.

**[Powers, duties, compensation, organization, etc.]** They shall make all contracts necessary for the construction and furnish-

ing of such city hall, which contracts shall be in the name of the city, and shall be made after advertisement and bidding, as provided by law for the making of other municipal contracts, and shall be subject to the approval of the directors of public service. Such commissioners shall select from their number a president, and may appoint a clerk, and such other employes as may be necessary, and, subject to the approval of the directors of public service, fix their compensation, and shall keep a full record of their proceedings. Such commissioners shall each receive such sum, not exceeding five dollars (\$5.00) each per meeting, as the directors of public service may fix, which compensation, however, shall not in any case exceed twelve hundred dollars (\$1,200.00) per annum each, and the compensation, of such commissioners, and expenses shall be paid in like manner as the cost of such city hall.

**[Commission for erection, etc., of market houses, or public halls; appointment of by board of public service; compensation, etc.]<sup>1</sup>**  
 Provided, further, that whenever any city has in contemplation or in process of construction, any market house or houses, or public hall in connection therewith, the directors of public service may provide for the employment of three citizens of each [such] city, to be named by them, who shall constitute a commission, which shall have power, subject to the approval of the directors of public service, to contract, in the name of such city, for and supervise the building and furnishing of, any market house or houses or public hall in connection therewith, for such city, and, subject to the like approval, to acquire any lands that may be necessary for such purpose, either by purchase or appropriation in the name of said city in the manner provided by law. Such person so appointed shall receive such compensation, not exceeding five dollars (\$5.00) each for each meeting attended by them as the directors of public service may fix, which compensation, however, shall in no case exceed

twelve hundred dollars (\$1,200.00) per annum each. Such commission may appoint a secretary and other necessary employes, and, subject to the approval of the directors of public service, fix their compensation, and adopt plans and specifications for erecting, completing and furnishing such market house or houses or public hall in connection therewith in any such city. The compensation of such commissioners and expenses, shall be paid in like manner as the cost of such buildings.

[Persons appointed pursuant to certain acts heretofore passed shall continue to act until purposes of appointment are fulfilled.] Provided, further, that any person or persons heretofore appointed pursuant to the provisions of an act entitled, "An act to create a board of supervision in the erection simultaneously of public, municipal and county buildings," passed May 6, 1902 (95 O. L., 879),<sup>1</sup> or of an act entitled "An act to authorize cities of the second grade of the first class to secure the necessary lands and to borrow money therefor, and for the purpose of building and erecting thereon a city hall and the furnishing of the same," passed April 19, 1898 (93 O. L., 549),<sup>1</sup> and amended May 6, 1902 (95 O. L., 877),<sup>1</sup> or an act entitled "An act relating to market houses in cities of the second grade of the first class," passed April 26, 1898 (93 O. L., 668),<sup>1</sup> or by whatever authority for the purpose provided herein, shall continue to act for the purposes for which he or they were appointed, with the power herein granted and no others, until the completion of the improvement in connection with which they were appointed; and thereupon the work so completed shall be turned over to the proper authority of the municipality.

[Provisions for the payment of bonds issued for construction of city hall.] Any city may use or apply any money received from any gas or electric [light] company under any



agreement heretofore or hereafter made, for the purpose of paying interest or principal of any bonds issued by such city for city hall purposes; and for the purpose of providing such further sums as may be necessary to pay the interest on any bonds for any of the purposes herein named, and the principal of the same at maturity, the council shall, in addition to the other levies authorized by law, levy annually a sufficient tax therefor on all property of the city subject to taxation, and such taxes shall be levied and collected as other taxes.

[Contracts and bonds heretofore made or issued for purposes herein authorized declared valid obligations; additional bonds authorized.] All contracts heretofore entered into by any city for the purposes herein specified and all bonds heretofore issued and sold by any city for any such purposes, shall be and remain valid, legal and binding obligations of such city, and all funds remaining from the sale of any such bonds shall be applied only for the purpose for which such bonds were sold; and any such city shall have power to issue and sell such additional bonds as may be necessary, up to the limit named in said acts, or any of them, for the purposes herein named.<sup>2</sup> [April 27, 1904, 97 v. 517.]

(1) **Constitutionality.** — The paragraph continuing the Cleveland Market House commission held unconstitutional. *Slatmyer v. Springborn*, 26 C. C. 100; 5 C. C. (N. S.) 89 (aff'd 72 O. S. 683).

**Members cannot act** under the new law. The control of market houses is in board of public service. *Ib.*

(2) These acts will be found in Part II.

**Amendments of 1904.**—Original section 216 of the Code was first amended April 23, 1904, 97 O. L. 255. An act approved April 27, 1904, 97 O. S. 517, again amended the same section, without any reference to the previous amendment. The text above follows the later act.

### 3. MUNICIPAL UNIVERSITIES.

**Sec. 217.** [Administration, management, etc., of municipal university and property thereof to be under board of directors appointed by the mayor.]<sup>1</sup> In any municipal corporation having a university supported in whole or in part by municipal taxa-

tion all the authority, powers and control vested in or belonging to said corporation with respect to the management of the estate, property and funds given, transferred, covenanted or pledged to said corporation in trust or otherwise for such university, as well as the government, conduct and control of such university shall be vested in and exercised by a board of directors consisting of nine electors of said municipal corporation, who shall be appointed by the mayor of such municipal corporation, three for a term of two years, three for a term of four years and three for a term of six years; and thereafter as the terms expire the mayor of such municipal corporation shall appoint three directors for a term of six years each and shall fill all vacancies in said board. Such board of directors shall be known as "The Board of Directors of ————— University" (filling out blank with the name of the university).

[**Powers and duties of such board.**] They shall serve without compensation and shall have all the powers and perform all the duties now and hereafter conferred or required by law in the government of said university, and the execution of any trust with respect thereto imposed upon the municipal corporation; and all acts or parts of acts not inconsistent herewith which govern such universities shall be and remain in full force and effect and sections 4095, 4096, 4097, 4099, 4100, 4101, 4102, 4103 and 4104 of the Revised Statutes of Ohio, as amended May 12, 1902, shall remain in full force and effect.<sup>2</sup>

(1) **Old sections.**—Section 4098 R. S. provided for a board of directors of nineteen members for the management of trusts for educational purposes and universities in municipalities, and § 4098-1 provided for the appointment of the board of directors of universities in cities of the first grade of the first class (Cincinnati) by the Superior Court. These two sections are not

expressly repealed by the Code, but since the above § 217 covers the subject matter of both and was clearly meant to supersede them, they must be regarded as repealed by implication. See note to § 212 of the Code, p. 478.

(2) **Amendments of 1904.**—The sections here mentioned were again amended May 3, 1904, and are given as last amended.

Section 4105 R. S. was neither re-enacted nor repealed by the Code. This section as it stood at the time the Code went into effect was a special act applying to Toledo alone and was probably repealed by implication. As amended in 1904, however, this section is a general act. It is therefore carried in this edition of the Code and will be found in the miscellaneous statutes in Part II., p. 844.

**Validity.**—The §§ 4095 to 4104 inclusive (as written before amendments of 1904), providing for the acceptance by certain cities of trust funds for educational purposes, were held not unconstitutional for want of corporate capacity on the part of the municipalities to receive and execute the trust nor because the acts were special. *State ex rel. v. Toledo*, 3 C. C. (N. S.) 468, 23 C. C. 327; and see also *Perin v. Carey*, 65 U. S. 465.

Nor is a tax levy to aid such institutions as here provided for, unconstitutional. *State ex rel. v. Toledo*, 23 C. C. 327.

**Character of board.**—A board of trustees such as provided for in these sections, is a legal board vested with certain powers, but is not a corporation. *Ib.*; see also *State v. Powers*, 38 O. S. 54.

**Actions against board.**—*Quo warranto* will not lie to oust the members of such board because they exceed their powers in extending the course of instruction. Injunction would be the proper remedy, and courts of equity would have jurisdiction in such cases. *State ex rel. v. Toledo*, 3 C. C. (N. S.) 468, 23 C. C. 327.

**University.**—The word “university” in Sec. 217 must be construed according to the legislative intent and not in its strict, technical sense, in construing gifts to a “university.” *Waddick v. Merrell*, 26 C. C. 437.

Erection of dwelling for president of university, held a proper application of university funds derived from taxation. *Cincinnati v. Jones*, 28 C. C. 210.

**Sec. 4095 R. S. [Board of directors of educational institution may accept educational trusts.]** The board of directors of the university, college or other educational institution of any municipal corporation, in the name and on behalf of such corporation, may accept and take any property or funds heretofore or hereafter given to such corporation for the purpose of founding, maintaining or aiding a university, college or institution for the promotion of education, and upon such terms, conditions and trusts not inconsistent with law as the said board of directors may deem expedient and proper for that end. [1904, May 3, 97 v. 541; 92 v. 358; 67 v. 86.]

**Sec. 4096 R. S. [How trust funds to be applied.]** For the further endowment, maintenance and aid of any such university, college or institution heretofore or hereafter founded, the



board of directors thereof may, in the name and in behalf of such municipal corporation, accept and take as trustee and in trust for the purposes aforesaid any estate, property or funds which may have been or may be lawfully transferred to the municipal corporation for such use by any person, persons or body corporate having the same, or any annuity or endowment in the nature of income which may be covenanted or pledged to the municipal corporation, towards such use by any person, persons or body corporate; and any person, persons or body corporate having and holding any estate, property or funds in trust or applicable for the promotion of education, or the advancement of any of the arts or sciences, may convey, assign and deliver the same to such municipal corporation as trustee in his, their or its place, or covenant or pledge its income or any part thereof to the same; and any such estate, property, funds or income shall be held and applied by such municipal corporation in trust for the further endowment, maintenance and aid of such university, college or institution, in accordance nevertheless with the terms and true intent of any trust or condition upon which the same was originally given or held.<sup>1</sup> [1904, May 3, 97 v. 541; 92 v. 358; 67 v. 86.]

(1) **Terms of donations.**—The directors of an institution of learning are at liberty under § 4096, relating to trust funds for the endowment, maintenance and aid of such schools, to reject a proposed

donation, if the terms under which it is offered are not acceptable, but donations which are accepted must be accepted in accordance with the terms prescribed. State *ex rel.* v. Schauss, 3 C. C. (N. S.) 388.

**Sec. 4097 R. S. [Trusteeship to vest in city, etc.]** Upon such transfer and the acceptance thereof by the municipal corporation and its successors, as trustees shall become and be perpetually obligated and held to observe and execute such trust in all respects according to any other or further terms or conditions lawfully agreed upon at the time of such transfer and

acceptance; and any court having jurisdiction of the appointment of trustees of such trust for educational purposes, may, in a proceeding for that purpose duly instituted and had, appoint and constitute such municipal corporation with the consent of its council, trustee of the estate, property and funds so transferred to it, and may dispense with bond and surety upon the part of the municipal corporation for the performance of such trust, unless the same is required by the original terms or conditions thereof, and shall upon the due transfer and acceptance of such trust by the municipal corporation, release and fully discharge the trustee, or trustees so transferring the same; and any acceptance or acceptances by such municipal corporation of any or all property, funds, rights, trust estate or trusts heretofore given, granted, assigned, or otherwise conveyed or transferred to, or bestowed upon any such municipal corporation or to or upon any such university, college or institution in good faith, and which are still held and retained by such municipal corporation, or any such university, college or institution, shall be held and deemed to be valid and binding as to all parties. [1904, May 3, 97 v. 542; 67 v. 86.]

**Sec. 4099 R. S. [Powers of board of directors.]** As to all matters not herein or otherwise provided by law, such board of directors shall have all the authority, power and control vested in or belonging to such municipal corporation as to the management and control of the estate, property and funds, given, transferred, covenanted or pledged to the municipal corporation for the trusts and purposes aforesaid, and the government, conduct and control of such university, college or institution; it may appoint a clerk and all agents proper and necessary for the care and administration of the trust property, and the collection of the income, rents and profits thereof; it may appoint the president, professors, tutors, instructors, agents and servants necessary and proper for such university, college or institution, and fix their compensation; it may provide all the necessary buildings, books, apparatus, means and appliances, and may pass all such by-laws, rules and regulations concerning the president, professors, tutors, instructors, agents, and servants, and the admission, government and tuition of

students, as it may deem wise and proper, and it may, by suitable by-laws, delegate and commit the admission, government, management and control of the students, courses of studies, discipline and other internal affairs of such university, college or institution, to a faculty which the board of directors may appoint from among the professors.<sup>1</sup>

The solicitor of such municipal corporation shall, whenever requested so to do by resolution of said board, prosecute and defend, as the case may be, for and in behalf of the corporation, all complaints, suits and controversies in which the corporation or such board is a party, and which relate to any property, funds, trusts, rights, claims, estate or affairs, which shall or may be under the control or direction of said board, or which shall, in any manner, relate to the conduct or government of such university, college or institution. [1904, May 3, 97 v. 542; 67 v. 86.]

(1) **Discretion of board** in management of affairs of institution, cannot be interfered with by the courts, on the ground that an un-

wise policy is being pursued. *State ex rel. v. Schauss*, 3 C. C. (N. S.) 388.

**Sec. 4100 R. S. [Citizens not to be charged for admission of children.]** Citizens of such municipality shall not be charged for instruction in the academic department, except in professional courses therein. Such board of directors may charge fees to students in other departments and to students in professional courses in the academic department, and shall have power in its direction [discretion] from time to time to make such university, college or institution free in any or all of its departments to citizens of such county in which such university, college or institution may be located. The board of directors may in their discretion receive other students on such terms as to tuition or otherwise as they may see fit. [1904, May 3, 97 v. 543; 92 v. 359; 66 v. 86.]

**Sec. 4101 R. S. [Account of receipts and expenditures of endowment fund; how said fund may be invested.]** The accounts of such trust estate, property and funds, and of the income and expenditure thereof, shall be kept by the auditor of such



municipal corporation entirely distinct from all other accounts or affairs of the municipal corporation, and the moneys shall be kept by the treasurer of the municipal corporation distinct from other moneys. And the said board of directors shall, at all times, confine their disbursements for current expenses within the income of the trust, estate, property and funds, and shall annually report to the mayor and council of such municipal corporation a full statement of the accounts of administration of such trust and other funds; and said board of directors is hereby authorized to invest any part of the funds belonging to, or set apart for the use of such university, college or institution, or to any department thereof, as it may, from time to time, deem proper, in bonds of the United States or of the State of Ohio, or of any municipal corporation in the State of Ohio, or any county or school district in the State of Ohio, or in any other bonds or first mortgage securities approved by the board of directors; and said board is further authorized to use any funds under its control for the improvement of real estate belonging to, or set apart for the use of, such university, college or institution. [1904, May 3, 97 v. 543; 80 v. 86; 67 v. 86.]

**Sec. 4102 R. S. [When board may confer degrees.]** The board of directors of such university, college or institution, may, upon the recommendation of the faculty thereof, confer such degrees and honors as are customary in universities and colleges in the United States, and such others as with reference to the course of studies and attainments of the graduates in special departments it may deem proper.

A university supported in whole or in part by municipal taxation, is hereby defined as an assemblage of colleges united under one organization or management, affording instruction in the arts, sciences and the learned professions, and conferring degrees. [1904, May 3, 97 v. 544; 67 v. 86.]

**Sec. 4103 R. S. [Council may provide site for municipal university.]** The council of any such municipal corporation may set apart, or appropriate as a site for the buildings and grounds of any such university, college or institution, any public grounds of the city not especially appropriated or dedicated by ordinance

to any other use, any other law to the contrary notwithstanding; and the board of education of any such municipal corporation may also, for a like purpose, set apart, convey or lease for a term of years, any grounds or building owned or controlled by such board of education. Any grant for the use of such grounds or buildings heretofore or hereafter made by any council or board of education, may be modified, changed or extended as to the time when the same shall take effect and be in force, or otherwise, by agreement between said council, or board of education, and the board of directors of such university, college or institution, and said council shall be taken and held to be the representative of such municipal corporation vested with the title, right of possession and entire control of such property for the purposes of a new grant.<sup>1</sup> [1904, May 23, 97 v. 544; 89 v. 251; 82 v. 121; 67 v. 86.]

(1) **Control of grounds** granted by municipality for university purposes vests in university trustees. *University v. Cincinnati*, 13 Dec.

741, 1. N. P. (N. S) 105. Enclosure of athletic field held a proper use of university grounds. *Ib.*

**Sec. 4104 R. S.** [When and how tax to be levied.] The council may assess and levy annually taxes on all the taxable property of such municipal corporation to the amount of five-tenths of one mill on the dollar valuation thereof, to be applied by said board to the support of such university, college or institution, and may also levy and assess annually five one-hundredths of one mill on the dollar valuation thereof, for the establishment and maintenance of an astronomical observatory, or for other scientific purposes, to be determined by the board of directors and to be used in connection with such university, college or institution, the proceeds of which shall be applied by the board of directors for such purposes exclusively; provided, however, that the taxes specified in this section shall only be levied and assessed when the chief work of such university, college or institution is the maintenance of courses of instruction, in advance of, or supplementary to, the instruction authorized to be maintained in high schools by boards of education. Said levies shall be made by council at the same time, and in the same manner as other levies for other municipal purposes, and shall be certified by council and placed upon the tax duplicate in the same manner as other municipal levies. The funds of any such university, college or institution shall be paid out by the treasurer upon the order of the board of directors and the warrant of the auditor. [1906, April 11, 98 v. 129; 97 v. 544; 95 v. 548; 94 v. 399; 90 v. 150; 67 v. 86; 75 v. 133.]

## 4. MUNICIPAL LIBRARIES AND TRUSTEES.

**Sec. 218.** [Administration, erection, equipment, etc., of free public municipal libraries to be placed under board of trustees appointed by the mayor; powers and duties of such board.] The custody, control and administration, together with the erection and equipment, of free public libraries established by municipal corporations,<sup>1</sup> shall be vested in six trustees, not more than three of whom shall belong to the same political party, and not more than three of whom shall be women, who shall be appointed by the mayor to serve without compensation for a term of four years and until their successors are appointed and qualified; provided, however, that in the first instance three of such trustees shall be appointed for a term of two years, and three thereof for a term of four years, and all vacancies shall be filled by like appointment for the unexpired term. Said trustees shall employ the librarians and necessary assistants, fix their compensation, adopt the necessary by-laws and regulations for the protection and government of the libraries and all property belonging thereto, and exercise all the powers and duties connected with and incident to the government, operation and maintenance thereof. It shall require four of said trustees to constitute a quorum and four votes to pass any measure or authorize any act, which votes shall be taken by the yeas and nays and entered on the record of proceedings of [said] trustees, and in the making of contracts said trustees shall be governed by the provisions of law applicable thereto.

[Women may be members of such board if qualified.] Every woman born or naturalized in the United States, of the age of twenty-one (21) years and upward, who shall have been a resident of the state at least one year, and of the city or village in which any such library may be established, for the period of thirty days, shall be qualified to be appointed and serve as such trustee.



[City council authorized to levy tax to compensate private company for maintaining free public library.] The council of each city shall have power to levy and collect a tax not exceeding one mill on each dollar of the taxable property of the municipality, annually, and to pay the same to a private corporation or association maintaining and furnishing a free public library for the benefit of the inhabitants of the municipality as and for compensation for the use and maintenance of the same and without change or interference in the organization of such corporation or association, requiring the treasurer of such corporation or association to make an annual financial report, setting forth all the money and property which has come into its hands during the preceding year, and its disposition of the same, together with any recommendation as to its future necessities. [1904, March 15, 97 v. 34.]

**(1) Power to establish and maintain** free public libraries is given to all municipalities in paragraph 22 of § 7 of the Code, page 61.

**Power to issue bonds** by library boards, see "An act to provide for the erection and equipment of public library buildings," 98 O. L. 260.

## 5. TAX AUTHORIZED FOR USE OF ART GALLERY.

**Sec. 218a.** [City council authorized to levy tax to compensate private company for maintaining free art gallery.] The council of each city shall have power to levy and collect a tax not exceeding one-quarter of one mill on each dollar of the taxable property of the municipality, annually, and to pay the same to a private corporation or association maintaining and furnishing a free museum or gallery for the exhibition of paintings, sculpture and other works of art, and, in connection therewith, an academy for advancing, improving and promoting painting, sculpture, drawing, architecture and other fine

arts, and furnishing instruction therein by lectures and otherwise, for the benefit of the inhabitants of the municipality as and for compensation for the use and maintenance of the same, and without change or interference in the organization of such corporation or association, requiring the treasurer of such corporation or association to make an annual financial report, setting forth all the money and property which has come into its hands during the preceding year, and its disposition of the same, together with any recommendation as to future necessities. [1906, April 14, 98 v. 146.]

#### 6. TAX AUTHORIZED FOR USE OF HOSPITAL.

**Sec. 219.** [City council authorized to levy tax to compensate private company for maintaining free public hospital.]

The city council of each city shall have power to levy and collect a tax not exceeding one mill on each dollar of the taxable property of the municipality, annually, and to pay the same to a private corporation or association maintaining and furnishing a free public hospital for the benefit of the inhabitants of the municipality, or to private corporation or association maintaining a public hospital, not free except to such inhabitants of the municipality as are in the opinion of a majority of the trustees of such hospital unable to pay, as and for compensation for the use and maintenance of the same and without change or interference in the organization of such corporation or association, requiring the treasurer of such corporation or association to make an annual financial report, setting forth all the money and property which has come into its hands during the preceding year and its disposition of the same, together with any recommendation as to its future necessities.

[1906, April 11, 98 v. 123.]

(1) **Power to establish and maintain municipal hospitals,** as distinguished from the hospitals referred to in the above section, is conferred upon all cities and villages by paragraph 16 of § 7 of the Code, page 55, and to levy taxes for their support by §§ 32 and 33 of the Code, pages 157 and 158. City hospitals are under the control of the board of public service, (§ 141 of the Code) and village hospitals are under the control of council. (§ 204 of the Code.)

## 7. PARKS AND HOSPITALS FOUNDED BY GIFT.

**Sec. 220.** [Management and administration of property or funds to be used for park or hospital purposes; in certain cases such property or fund to be managed, administered, etc., by board of trustees to be appointed by sinking fund trustees.] In any municipal corporation which has become or may hereafter become the owner or trustee of property for any park or hospital purposes, or of funds to be used in connection therewith, by deed of gift, devise or bequest, said property or funds shall be managed and administered in accordance with the provisions or conditions of said deed of gift, devise or bequest, provided that in all cases where such deed of gift, devise or bequest requires the investment, or change of investment of the principal of said property or funds, or any part thereof, to be made upon the approval of any advisory committee appointed by any court or judge, then such property or funds, secured by deed of gift, devise or bequest, for any such purposes, and any hospital or park property for the care or management of which in whole or in part, said fund is used, shall be managed, controlled and administered, the park funds and property by a board of park trustees, and the hospital funds and property by a board of hospital trustees, each board consisting of four resident electors of said municipal corporation who shall be appointed by the sinking fund trustees of said municipal corporation and shall serve without compensation for the term of four years and until their successors are appointed and qualified. Said trustees shall be appointed in the first instance to serve for one, two, three and four years respectively, and thereafter their successors shall be appointed one each year to serve for



the term of four years, provided, however, that of the four trustees so appointed not more than two shall be of the same political party. In case of vacancy by death, resignation or otherwise in such board of trustees, the same shall be filled in like manner for the remainder of the term. Said board of trustees shall have the right to apply, control and invest and reinvest the funds coming or arising from such gift, devise or bequest according to the terms and conditions on which acquired; and shall respectively be the successors of any board or officers now having control or management of any such property or funds herein described, and said funds or other property then held and controlled by any theretofore existing park or hospital board, and the duties vested in or imposed upon such boards or officers shall be transferred to the trustees herein provided. Such park board herein provided for shall be governed by the provisions of sections 2515-39, 2515-40, 2515-41, 2515-42, 2515-43, 2515-44, 2515-45, 2515-45*e*, 2515-45*f*, 2515-45*g*, 2515-45*h*, 2515-45*i*, 2515-45*j* and 2515-45*k* of the Revised Statutes of Ohio, and such hospital board herein provided for shall be governed by the provisions of sections 2167-9, 2167-10, 2167-11, 2167-12, 2167-13, 2167-14, 2167-15, 2167-16, 2167-17, 2167-18, 2167-19, 2167-20, and 2167-21, of the Revised Statutes of Ohio.

**Sec. 2515—39 R. S. [Compensation; oath; bond.]** § 3. The members of said board of park commissioners shall serve without compensation, and before entering upon the discharge of their duties shall each take the oath of office prescribed by law, and shall give bond in the sum of twenty-five hundred (\$2,500) dollars, conditioned according to law, and to the approval of the mayor and council of such city. [93 v. 463.]

**Sec. 2515—40 R. S. [Meetings; rules and regulations; record; passage of resolution or order; quorum; clerk.]** § 4. Such board of park commissioners shall hold meetings at least once a month, and shall adopt all necessary rules for the regulation of its business; it shall keep a complete record of all its proceedings, which record, or a copy thereof, duly certified by the clerk of said board, shall be competent evidence of the transactions of said board in all the courts of this state; the ayes and

nays shall be called upon the passage of every resolution or order; three members of the board shall constitute a quorum for the transaction of all business, but no resolution or order shall be adopted unless three members shall vote in its favor. The city clerk shall act as the clerk of such board of park commissioners, and shall receive no additional salary or compensation for such services [93 v. 463.]

**Sec. 2515—41 R. S. [Board's control.] § 5.** Such board of park commissioners shall have the entire management and control of all parks now belonging to any such city, or which may hereafter be acquired and of all the streams within and flowing through any park controlled by such board. Such board of park commissioners shall also have the entire management and control of all improvements of every nature within the park or parks of any such city; and of all moneys derived from levies made for park purposes, and of all moneys from the general fund appropriated by the council for such purposes, and of the proceeds of all bonds issued or sold for park purposes, and of all moneys or other property donated to any such city for park purposes; all of which moneys shall be placed in a special fund called the "park fund," and shall be disbursed by the treasurer of any such city, only upon a warrant of the city clerk, drawn in accordance with the order of such board of park commissioners. [93 v. 463.]

**Sec. 2515—42 R. S. [Board's powers.] § 6.** Such board of park commissioners shall have power to make contracts for the improvements of the grounds, the erection of the necessary bridges and structures therein, and to adopt rules for the protection, care and government of the parks under its charge, and such rules, when approved by the council of any such city, shall have the same effect and may be enforced by the same penalties as ordinances of the city. [93 v. 464.]

**Sec. 2515—43 R. S. [Power to incur liability.] § 7.** Such board of park commissioners shall have no power to incur any liability for park purposes beyond the amount of the funds levied therefor or appropriated to their order by the council for such purposes. [93 v. 464.]

**Sec. 2515—44 R. S. [Employment of superintendents, etc.] § 8.** Such board of park commissioners may employ such superintendents, landscape gardeners and other employes as it may deem necessary for the execution of its duties, and fix their salaries or compensation; and any such persons may be removed by such board at any time. [93 v. 464.]

**Sec. 2515—45 R. S. [Report to council; detailed estimates.] § 9.** Such board of park commissioners shall annually, on the first Monday in April, make a report to the council of their proceedings in respect to parks, with a detailed state-

ment of their receipts and expenditures during the year; and they shall also at the same time submit to the council a detailed estimate of the amount of money necessary to maintain and improve such park or parks for the ensuing year. [93 v. 464.]

**Sec. 2515—45e R. S.** [Park commissioners to have control of improvement of natural watercourses.] § 5. Such board of park commissioners shall have entire management and control of all work of straightening, cleaning, deepening, or otherwise improving any natural watercourse, whether partly or wholly used for sewer purposes or not, within such city, and shall be empowered to purchase, acquire or condemn any water rights, easements or privileges in connection with any natural watercourse through such city, and to acquire or condemn such real estate as may be necessary for such purposes. [94 v. 717.]

**Sec. 2515—45f R. S.** [Contracts; bids when.] § 6. It shall be the duty of such board of park commissioners, before entering into any contract for the performance of any work, the cost of which exceeds one thousand dollars, to cause plans and specifications and forms of bids to be prepared, and when adopted by such board, it shall have the same printed for distribution among bidders. [94 v. 718.]

**Sec. 2515—45g R. S.** [Notice for proposals.] § 7. The board shall not enter into any contract for work or supplies where the estimated cost thereof exceeds one thousand dollars, without first causing thirty days' notice in one newspaper of general circulation in the corporation that sealed proposals may be received for doing the work or furnishing such materials and supplies. [94 v. 718.]

**Sec. 2515—45h R. S.** [Bond to accompany bids.] § 8. Each bid shall be accompanied by a bond, signed by sufficient security, for the acceptance of the contract, if awarded by the board. [94 v. 718.]

**Sec. 2515—45i R. S.** [Opening bids, etc.] § 9. All bids for work and supplies shall be enclosed in a sealed envelope and same deposited with the clerk of the board, and such sealed envelope shall have endorsed thereon the nature of the same, and all bids shall be opened at a regular meeting of the board. [94 v. 718.]

**Sec. 2515—45j R. S.** [Awarding contracts.] § 10. The board shall enter into contract with the lowest responsible bidder, upon his giving bond to the corporation with such sureties as the board shall approve, that he will perform the work or furnish the material and supplies in accordance with his contract, and such board shall be the final judges as to who are



responsible bidders, and on the failure of such bidder, within a reasonable time, to be fixed by the board, to enter into bond with surety as before provided, the contract may be made with the next highest responsible bidder, and so on until the contract is effected by the contractor giving bond as aforesaid; provided that the board may reject any and all bids, and that no member of the said board shall be in any manner, either directly or indirectly, interested in any contract. [94 v. 718.]

**Sec. 2515—45k R. S. [Reports and estimates.] § 11.** Such board of park commissioners shall annually, on the first Monday of April of each year, make a written report to the council of such city, of their proceedings, with a detailed statement of their receipts and expenditures, during the year. And they shall also at the same time submit to the council a detailed estimate of the amount of the money necessary to dredge, straighten, clean, deepen, and otherwise improve such water-courses and purchase and acquire such water rights, easements and privileges. [94 v. 718.]

**Sec. 2167—9 R. S. [Compensation; oath; bond.] § 3.** The members of said board of hospital trustees shall serve without compensation, and before entering upon the discharge of their duties shall take the oath of office prescribed by law, and shall each give bond in the sum of twenty-five hundred (\$2,500) dollars, conditioned according to law and to the approval of the mayor and council of such city. [93 v. 709.]

**Sec. 2167—10 R. S. [Meetings; rules and regulations; record; passage of resolution or order; quorum; no member to be interested in contract; clerk.] § 4.** Such board of hospital trustees shall hold meetings at least once a month, and shall adopt all necessary rules for the regulation of its business; it shall keep a complete record of all its proceedings, which record, or a copy thereof, duly certified by the clerk of said board, shall be competent evidence of the transactions of said board in all the courts of this state; the ayes and nays shall be called upon the passage of every resolution or order; three (3) members of the board shall constitute a quorum for the transaction of all business, and no resolution or order shall be adopted or contract or other obligation entered into unless three (3) members shall vote in its favor; and no member of the said board shall be interested, directly or indirectly, in any contract concerning any hospital under the control of said board. The city clerk shall act as the clerk of such board of hospital trustees, and shall receive no additional salary or compensation for such services. [93 v. 709.]

**Sec. 2167—11 R. S. [Board's control.]** § 5. Such board of hospital trustees, subject to the ordinances of council, shall have the entire management and control of any hospital or hospitals now belonging to any such city, or which it may hereafter acquire, and shall establish such rules for the government thereof and the admission of persons thereto as it may deem expedient; such board of hospital trustees shall also have the entire control of the expenditure of all moneys which any such city may, from time to time, have available for hospital purposes from whatever sources the same may have been derived, and the same shall be disbursed by the treasurer of any such city only upon the warrant of the city clerk, drawn in accordance with the order of such board of hospital trustees. [93 v. 709.]

**Sec. 2167—12 R. S. [Further as to same.]** § 6. Such board of hospital trustees shall have the entire management and control of the erection, rebuilding and repair of all buildings used for hospital purposes, and shall also have the entire management and control of all grounds used for hospital purposes, and shall adopt rules and regulations for the protection, care and government of all such buildings and grounds under its charge, and such rules, when approved by the council of any such city, shall have the same effect and may be enforced by the same penalties as ordinances of the city. [93 v. 709.]

**Sec. 2167—13 R. S. [Procedure before entering into contracts.]** § 7. It shall be the duty of such board of hospital trustees before entering into any contract for the erection of a hospital building, or for the rebuilding or repair of any hospital building, the cost of which exceeds one thousand (\$1,000) dollars, to cause plans, specifications, detailed drawings and forms of bids to be prepared, and when adopted by the board, it shall have the same printed for distribution among the bidders. [93 v. 709.]

**Sec. 2167—14 R. S. [How contracts to be made.]** § 8. All contracts shall be made in the name of the corporation, and it shall be stipulated therein that the contractors will not execute any extra work or make any modifications or alterations in the specifications and plans, unless ordered in writing by the board; that they will not claim pay for the same unless such written order is given, and the extra price or compensation fixed and agreed upon; and copies of the plans and drawings attested by the contractor, and the original bids, specifications and contracts shall be deposited in the office of the clerk of the corporation. [93 v. 710.]

**Sec. 2167—15 R. S. [Notice for bids.]** § 9. The board shall not enter into any contract for work, or supplies, where the estimated cost thereof exceeds one thousand (\$1,000) dollars, without first causing thirty (30) days' notice to be given in one newspaper of general circulation in the corporation, that sealed proposals will be received for doing the work or furnishing the materials and supplies. [93 v. 710.]

**Sec. 2167—16 R. S. [Bids.]** § 10. Each bid shall be accompanied with a bond, signed by sufficient security, for the acceptance of the contract, if awarded by the board, to fully secure any difference between the amount of such bid and the next higher bid; and such amount shall be collected by the board and paid into the hospital fund, in case of the refusal by the bidder to enter into contract according to his bid, within such reasonable time, as the board may determine. [93 v. 710.]

**Sec. 2167—17 R. S. [Same.]** § 11. All bids shall be enclosed in a sealed envelope, and deposited with the clerk of the board, and such sealed envelope shall have endorsed thereon the nature of the same; and all bids shall be opened at a regular meeting of the board. [93 v. 710.]

**Sec. 2167—18 R. S. [With whom board to contract.]** § 12. The board shall enter into contract with the lowest responsible bidder, upon his giving bond to the corporation, with such security as the board shall approve, that he will perform the work and furnish materials or supplies in accordance with his contract; and on the failure of such bidder within a reasonable time, to be fixed by the board, to enter into bond with the security before provided, a contract may be made with the next lowest responsible bidder, and so on, until a contract is effected by a contractor giving bond as aforesaid; provided that the board may reject any and all bids. [93 v. 710.]

**Sec. 2167—19 R. S. [Power of board to incur liabilities.]** § 13. Such board of hospital trustees shall have no power to incur any liability for hospital purposes beyond the amount of the funds levied, or otherwise received for such purpose. [93 v. 710.]

**Sec. 2167—20 R. S. [Employment of superintendents, physicians, etc.]** § 14. Such board of hospital trustees may employ such superintendents, physicians, nurses and other employes as it may deem necessary for the execution of its duties, and fix their salaries or compensation; and any of such persons may be removed by such board at any time. [93 v. 710.]

**Sec. 2167—21 R. S. [Report to council; estimate.]** Such board of hospital trustees shall annually, on the first Mon-



day in April, make a report to the council of their proceedings in respect to hospitals, with a detailed statement of their receipts and expenditures during the year; and they shall also at the same time submit to the council a detailed estimate of the amount necessary to maintain and improve such hospital for the ensuing year. [93 v. 710.]

## VI

## ELECTION, APPOINTMENT AND REMOVAL OF OFFICERS.

**Sec. 222.<sup>1</sup>** [**Municipal officers; election and beginning of term.**]<sup>2</sup> All elective municipal officers, and judges and clerks of police courts and assessors shall be chosen on the first Tuesday after the first Monday in November in the odd numbered years, for a term of two years, except judges of police courts who shall be chosen for a term of four years, and their respective terms of office shall commence on the first day of January next after their election. [1906, April 14, 98 v. 172; 97 v. 39.]

(1) There is no Code § 221.

(2) **Old section.**—Compare old § 1723 R. S. (repealed).

**Municipal elections.** — Other provisions relating thereto will be found under the title OFFICERS, *Election and Removal*, in Part II.

**Sec. 223.** [**Appointment of municipal officers.**] The directors of public safety, directors of the university, street commissioner or any board or officer whose appointment is required by this act shall be appointed not earlier than the second Monday in May and not later than the first Monday in June, 1903, and subsequently, after the expiration of the terms of said boards and officers, their successors shall be appointed not earlier than the second Monday in January, and not later than the first Monday in February, and the boards and officers serving when this act goes into effect shall hold their respective offices until their successors are appointed as required herein. [Amended 1904, March 17, 97 v. 39.]

**Sec. 224.** [**Oaths and bonds; “city clerk,” meaning of words.**] With respect to oaths of office and official bonds and the effect of the failure to take or give the same, sections

1737, 1738, 1739, 1740, 1741, 1742, and 1743, of the Revised Statutes of Ohio, where not inconsistent with this act, shall be and remain in full force and effect; and where the words "city clerk" appear in said sections they shall be construed to mean, in a city, the auditor, and in a village, the clerk.

**Sec. 1737 R. S. [Qualifications; oaths; solicitor.]**<sup>1</sup> Each officer<sup>2</sup> of the corporation, or any department or board thereof, whether elected or appointed as a substitute for a regular officer, shall be an elector<sup>3</sup> within the corporation, except as herein expressly provided, and before entering upon his official duties, shall take an oath or affirmation to support the constitution of the United States and the constitution of Ohio, and an oath or affirmation that he will faithfully, honestly, and impartially discharge the duties of the office,<sup>4</sup> and the provisions as to official oaths shall extend to deputies, but they need not be electors. And no person shall be eligible to the office of solicitor of the corporation who is not an attorney and counselor of [at] law duly admitted to practice in this state as provided by law. [92 v. 68; 66 v. 162, § 79; (S. & C. 1525).]

(1) **Other provisions.**—Compare provisions in Art. XV., Sec. 4 Const., requiring all officers to be electors; § 2 R. S. requiring all officers, including deputies, to take oath of office.

(2) **Who is an officer.**—Definition of office, see *Shaw v. Jones*, 4 N. P. 372; *State v. Jennings*, 57 O. S. 415.

A fireman appointed by proper municipal authorities and having no control over fire department or property, but merely subject to the fire chief and board, and paid by the month, is not an officer. *State v. Jennings*, 57 O. S. 415.

So it was held an employe of a city to trim lights in its electric light department is not an officer. *State v. Anderson*, 57 O. S. 429.

And an engineer employed to run an engine in electric light department is not an officer. *Ib.*

Clerk of water works board or clerk of board of public service, not

an officer. *Hutchinson v. Lima*, 27 C. C. 545; 6 C. C. (N. S.) 529.

Workhouse matron not an officer, but an employe. *Jameson v. Cincinnati*, 28 C. C. 41; 7 C. C. (N. S.) 100.

*Deputy* is held not to be an officer within Art. XV., § 4, of Constitution. *Warwick v. State*, 25 O. S. 21; nor within the meaning of the penal laws relating to officers, *State v. Meyers*, 56 O. S. 340, 349; but a deputy is required by § 1737 R. S. above, to take an oath of office. There is no requirement that he give bond, and he would not, according to the cases above, be an officer mentioned in the statute requiring "officers" to give bond.

(3) **Officers must be electors.**—Persons not citizens of the United States, and therefore not electors, cannot be officers. *State ex rel. v. Collister*, 27 C. C. 529; 6 C. C. (N. S.) 33. And a person disqualified at the time of his election cannot



thereafter, by removing the disqualification, hold the office. *Id.*

*Females* are ineligible to office, not being electors. State *ex rel.* v. Rust, 4 C. C. 329; State v. Adams, 58 O. S. 612; State v. McKinley, 57 O. S. 627. But since a deputy is not an officer a female may be a deputy. Warwick v. State, 25 O. S. 21.

**De facto officers defined.**—*Ex parte* Strang, 21 O. S. 610; Ermston v. Cincinnati, 7 N. P. 635; State v. Gardner, 54 O. S. 24; Gitsky v. Newton, 17 C. C. 484, aff'd 60 O. S. 605; State v. O'Brien, 47 O. S. 464; Brenier v. Becker, 37 O. S. 72; State v. Alling, 12 O. 16; State *ex rel.* v. Constable, 7 O. (pt. 1) 7.

**Acts of de facto officers valid.**—Heck v. Findlay, etc., 16 C. C. 111, aff'd 62 O. S. 654; State v. Bingham, 14 C. C. 245; Ickes v. State, 16 C. C. 31; State *ex rel.* v. Constable, 7 O. (1st pt.) 7; Smith v. Lynch, 29 O. S. 261; Kirker v. Cincinnati, 48 O. S. 507; Guernsey Co. v. Cambridge, 7 C. C. 72; Molitor v. State, 6 C. C. 263, aff'd 29 B. 152.

An officer holding under an unconstitutional law is a *de facto* officer, and his acts cannot be collaterally attacked. *Ex parte* Strang, 21 O. S. 610; Heck v. Findlay, 16

C. C. 111 (aff'd 62 O. S. 654); State v. Gardner, 54 O. S. 24; Gitsky v. Newton, 17 C. C. 484; State *ex rel.* v. Bingham, 14 C. C. 245.

As to validity of acts of officers or boards under an unconstitutional statute or ordinance, see Findlay v. Pendleton, 62 O. S. 80; Kirker v. Cincinnati, 48 O. S. 507; Smith v. Lynch, 29 O. S. 261.

(4) **Necessity of oath.**—All officers must take an oath of office, no matter whether the statute prescribes an oath or not. If an office is created in any way, before the person to occupy it enters upon his official duties, he must take an oath of office. State *ex rel.* v. Kennon, 7 O. S. 546.

But it has been held that members of a board of review having taken an oath of office as members of such board, need not take another oath when acting as the decennial board of equalization. N. C. Harmony Lodge v. Hagerty, 28 B. 66.

As to person appointed temporarily to assist officer, see Martin v. State, 16 O. 364.

To be entitled to a salary an officer must take the oath and qualify according to law. State v. Eshelby, 2 C. C. 468.

See further notes under § 1740 R. S., p. 507.

## FORM OF OATH OF OFFICE.

.....County, } ss.  
State of Ohio,

I, ....., do solemnly swear [or affirm] that I will support the constitution of the United States and the constitution of the State of Ohio, and that I will faithfully, honestly and impartially discharge the duties of the office of.....of the city [or village] of....., State of Ohio, during my continuance in said office.

Sworn to [or affirmed] before me and subscribed in my presence this.... day of....., 19....

.....  
Notary Public.

**Sec. 1738 R. S. [Official bonds.]** The official bonds of all municipal officers shall be prepared by the solicitor; they shall, except as otherwise provided in this title, be in such sum as the board of trustees<sup>1</sup> or council shall prescribe, by general or special ordinance, and be subject to the approval of the mayor, except that the mayor's bond shall be approved by the council, or if it [is] not legally organized, by the clerk of the Court of Common Pleas of the county in which the corporation or the larger part thereof is situate; the condition that the person elected or appointed shall faithfully perform the duties of the office, shall be sufficient;<sup>2</sup> and the fact that the instrument is without a seal; that blanks, like the date or amount, have been filled subsequent to the execution of it, but before its acceptance, without the consent of the sureties; that all the obligees named in the instrument have not signed it; that new duties have been imposed on the officer; or that any merely formal objection exists, shall not be available in any suit on the instrument.<sup>3</sup> [66 v. 163, § 81; 74 v. 142, § 80.]

(1) **Trustees** here evidently means trustees of hamlets and not any board of trustees there may be in cities or villages. As to status of hamlets see note under § 1 of the Code.

(2) **Condition in bond.**—As to sufficiency of condition, compare § 7 R. S. under OFFICERS in Part II.

An official bond conditioned for the faithful discharge of the duties of an office "according to law" embraces duties required by laws in force during the term of the officer, whether enacted at or after the execution of the bond. *Dawson v. State*, 38 O. S. 1; *King v. Nichols*, 16 O. S. 80.

If bond omits the condition requiring officer to pay over all moneys received by him, it is immaterial, as it would be cured by § 7 R. S. *State ex rel. v. Slough*, 12 C. C. 105.

**Acceptance of bonds.**—Formal acceptance of officers' bond is not necessary. Receiving the bond with-

out objection is sufficient. *Barret v. Reed*, 2 O. 409, 413; *Rogers v. Pugh*, 1 Disney, 443.

Where proper bond is tendered, it must be accepted, and no discretion to refuse it is allowed. *State v. Cincinnati*, 11 O. S. 544; and *mandamus* will lie to compel acceptance. *Ib.*; *State ex rel. v. Lewis*, 10 O. S. 128; *O'Connell v. Boyle*, Ohio Dec. (Dayt.) 280.

**Rejection of bond** may be shown by parol. *Westerhaven v. Clive*, 5 O. 136.

**Character of bond.**—See § 3641c R. S. in Part II., p. 539.

**Validity.**—Bond may be good in part and bad in part, and though defective under the statute, it may be a good bond at common law. *State v. Findley*, 10 O. 51.

The bond will be valid though the name of surety is omitted from body of bond. *McClain v. Simington*, 37 O. S. 484; *Partridge v. Jones*, 38 O. S. 375.

Mistake in name of obligee, does not invalidate the bond. *Barret v. Reed*, 2 O. 409.

(3) **Liability of sureties.**—*Defective bond.*—Sureties who execute a bond may be liable on a bond reciting the name of the officer, though the officer has not signed it. *State v. Bowman*, 10 O. 445.

**Extent of liability.**—*General principles.*—Sureties are liable for acts of the official virtute officii within his official authority but unfaithfully or improperly done, but not for acts of the official colore officii with pretense of official authority. *Storey v. Jennings*, 4 O. S. 418; *Drolesbaugh v. Hill*, 64 O. S. 257; nor where the official has been guilty of misconduct wholly outside of the line of his official duty as prescribed by law. *State v. Medary*, 17 Ohio 554; *State v. Griffiths*, 74 O. S. — (51 B. 259; *State v. Cottle*, 8 C. C. (N. S.) 120.

*Officer acting beyond duty.*—Interest arising from money deposited by treasurer, is covered by his bond, whether the deposit was authorized or not. *Eshelby v. Bd. of Education*, 66 O. S. 71; *Glenville v. Englehart*, 19 C. C. 285.

But where a clerk performed an act which was beyond the duties of his office, it was held his sureties were not liable. *Carpenter v. Sloane*, 20 O. 327.

It was held the sureties on a county treasurer's bond were liable for taxes collected by him and misapplied, though the levy of the taxes was illegal. *Feigert v. State*, 31 O. S. 432.

They are liable for sums drawn by clerk when not authorized by council or larger than allowed by council, and appropriated to his own use, and money received from cashing and appropriating to his own use claims allowed by council and belonging to other persons. *Greenville v. Anderson*, 58 O. S. 463.

*Acting as other officer.*—Bond for faithful performance of duties by member of a board, will not cover defalcations of such officer while acting as an appointee of the board (such as commissioner appointed by board) even though members of the board only are eligible to such appointment. *State v. Medary*, 17 O. 554.

*Acts during other term.*—A bond given for the first term does not cover acts of the officer during his second term, no valid bond being given for the second term. *State v. Crooks*, 7 O. (2nd. pt.) 221; *State v. Corey*, 4 W. L. M. 563.

Whether sureties on the bond of an officer holding over until his successor qualifies, would be liable during the time of such holding over, *quere*. *State ex rel. v. Killits*, 8 C. C. 30.

Where the officer's bond was not accepted until part of his term had expired, and he had collected money both before and after the bond was accepted, the sureties will be liable for peculations from all sums collected, if not shown from what particular fund the money was stolen by the officer. *Reed v. Board of Education*, 39 O. S. 635.

The defalcation is presumed to have occurred during the term for which the last bond was given. *Pummill v. Baumgartner*, 3 N. P. 40; *Kelly v. State*, 25 O. S. 567; *State v. Corey*, 4 W. L. M. 563.

*Where new duties imposed.*—The surety is liable for default in connection with new duties imposed on the officer since giving of bond, if such duties are appropriate to his office, but not if the duties are not appropriate to the office. *St. Marys v. Rowe*, 15 Dec. 687; 2 N. P. (N. S.) 645. The new duty imposed by ordinance on clerk of council to collect special assessments is not appropriate to his office, and will not make his sureties liable for default in this connection. *Ib*.

*After death of principal.*—Sureties are liable for failure of personal representative of officer to pay over money that came into officer's hands officially. *Peabody v. State*, 4 O. S. 387.

**Defenses of surety.**—Negligence or the treasurer in paying warrants drawn by the city clerk does not relieve sureties on clerk's bond. *Greenville v. Anderson*, 58 O. S. 463.

Omission of principal to take the oath of office does not relieve sureties of liability. *State v. Findley*, 10 O. 51; *Gage v. Payne*, *Wright*, 678.



It is no defense that the money was not demanded from the principal until after his term expired. *King v. Nichols*, 16 O. S. 80; nor that demand was not made until after death of principal. *Peabody v. State*, 4 O. S. 387.

The sureties may have any defense that the principal could set up, including the statute of limitations. *State v. Blake*, 2 O. S. 147; *State v. Conway*, 18 O. 234. As to the limitations of actions on official bonds, see *State v. Blake*, 2 O. S. 147.

It was held no defense to a suit on a county treasurer's bond, that the money was stolen from him without any fault of his own. *State v. Harper*, 6 O. S. 607.

The rule that an act by the creditor, prejudicial to the surety, dis-

charges him, does not apply to sureties on official bonds for faithful performance. *State v. Alden*, 12 O. 59.

Blanks in bond filled after execution. See § 6 R. S. under OFFICERS in Part II.

**Pleading and practice.**— In action against obligors on bond the personal representative of principal is not a necessary party. *Hunt v. Gaylor*, 25 O. S. 620.

Petition on an official bond must aver the condition of the bond, and not merely that it was given according to law. *Bisack v. Pape*, 1 B. 126; it must aver also, the office and the appointment or election to it. *Court of Common Pleas v. Seargent*, W. 482; but it need not aver that the officer qualified. *State v. Piatt*, 15 O. 15.

FORM OF OFFICIAL BOND.

*Know all men by these presents; That we.....principal, and.....and....., sureties, are held and firmly bound unto the city [or village] of....., State of Ohio, in the sum of \$.....to be paid to the said city [or village], for the payment whereof well and truly to be made we jointly and severally bind ourselves, our heirs, executors and administrators firmly by these presents.*

*Witness our hands this.....day of....., 19....*

*The condition of the above obligation is such that, Whereas, the said.....was, on the.....day of.....elected [or appointed] to the office of.....of the city [or village] of....., State of Ohio for the term of.....years and until his successor is elected [or appointed] and qualified.*

*Now therefore, if the said.....faithfully performs the duties of the said office during his continuance therein then this obligation shall be void and of no effect; otherwise to be and remain in full force, effect and virtue.*

.....  
.....  
.....

Executed in presence of  
.....  
.....  
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**Sec. 1739 R. S. [Approval of bond; additional bond.]** Each officer named in chapter two of this division,<sup>1</sup> and all others, except as in this title provided, who may be required so to do, by law or ordinance, shall give bond, before entering on the duties of the office; each officer may be required by the council, in its discretion, at any time, to give a new or additional bond; each bond, except the bond of the clerk, shall, upon its approval, be delivered to the city clerk, who shall immediately record the same in a record provided for that purpose, and file and carefully preserve the same in his office; and the bond of the clerk shall be delivered to the city auditor, who shall in like manner record and preserve the same.<sup>2</sup> [74 v. 142, § 80.]

(1) **Chapter and Division** here referred to are Chap. 2, Div. 4, Title XII, R. S., containing former statutes relating to officers of cities and villages.

(2) **Additional bonds.**—Where an officer is required to give an additional bond, either or both sets of

bondsmen are liable for his defaults. *State v. Crooks*, 7 O. (2nd pt.) 221; but both cannot be joined in same action. *Id.* And the additional bond covers defalcations during the entire term. *Thorne v. Megrue*, 3 Rec. 140.

**Sec. 1740 R. S. [Effect of failure to take oath or give bond.]** The council may declare vacant the office of any person elected or appointed to an office who shall fail to take the oaths required in section *seventeen hundred and thirty-seven* or to give any bond required of him, within ten days after he has been notified of his appointment, or election, or obligation to give a new or additional bond, as the case may be.<sup>1</sup> [67 v. 70, § 80.]

(1) **Effect of failure to take oath, etc.**—See § 2 R. S., under OFFICERS, in Part II, providing that failure to take oath does not affect liability of sureties; and § 19 R. S. providing that failure to give bond as required shall be deemed a refusal of the office and the same shall be considered vacant.

By the above section 1740 R. S., however, the failure to take oath or

give bond does not *ipso facto* vacate the office.

The oath of office and bond have been held not conditions precedent to entering upon the duties of the office. *State v. Findley*, 10 O. 51; *State ex rel. v. Pollner*, 18 C. C. 304.

As to time of giving bond, see subject discussed in *State ex rel. v. Comm'rs*, 61 O. S., 506; *State ex rel. Witham v. Nash*, 65 O. S., 549.

**Sec. 1741 R. S. [If new bond required, notice to be given.]** When the council declares, by resolution, that an officer shall give a new bond, written notice shall be served by the clerk<sup>1</sup> of

the corporation upon the officer designated, and a copy of the notice, with a statement of the time and place of service, shall be recorded in the proceedings of the council. [74 v. 114, § 2.]

(1) See § 224 of the Code, page 502.

**Sec. 1742 R. S. [Office vacant if notice not complied with.]**

If the officer fail to give such new bond, with sureties, to the satisfaction of the council, within ten days after such service, the council shall declare the office vacant, and the vacancy shall be filled in the manner provided in this title. [74 v. 114, § 2.]

**Sec. 1743 R. S. [How sureties affected.]** When the new bond is accepted, or the council declares the office vacant, the sureties in the original bond shall cease to be liable for the acts of the officer done thereafter, but not for the acts then already done. [74 v. 114, § 3.]

**Sec. 225. [Impeachment of head of department or officer; procedure.]**<sup>1</sup> It is hereby made the duty of the mayor to have a general supervision over each department and the officers provided for in this act, and where the mayor has reason to believe that the head of any department or officer provided for in this act has been guilty in the performance of his official duty of bribery, misfeasance, malfeasance, non-feasance,<sup>2</sup> misconduct in office, or any gross neglect of duty, gross immorality or habitual drunkenness, he shall immediately file with the council written charges<sup>3</sup> against said head of department or officer, setting forth in detail a statement of such alleged bribery, misfeasance, malfeasance, non-feasance, misconduct in office, gross neglect of duty, gross immorality or habitual drunkenness, and he shall serve or cause to be served at the time of the filing of said charges or as soon thereafter as possible, a true copy of such charges with the head of the department or officer against whom said charges are made, and may serve the same in person or by leaving a copy of said charges at the office of the head of such department or officer and make due return to council of such



service as is provided for the return of the service of summons in a civil action.<sup>4</sup> Said charges when so filed with council shall be for hearing at the next regular meeting of council, unless council shall extend the time for the hearing of the same, which shall only be done on the application of the accused.<sup>5</sup> The accused shall have the right to appear in person and by counsel and examine all witnesses and answer all charges against him; and the judgment or action of council shall be final provided that it shall require the votes of two-thirds of all members elected to council to remove such officer.<sup>6</sup> Pending any of said proceedings such head of department or officer may be suspended by a majority vote of all members elected to council, but such suspension shall not be for a longer period than fifteen days unless the hearing of said charges shall be extended upon the application of the accused, and in such event the suspension shall not exceed a period of thirty days. Provided, that for the purpose of investigating charges against the head of any department or officer as aforesaid, the council, shall have power to issue subpoenas, or compulsory process to compel the attendance of persons and the production of books and papers before the council, and shall have power to provide by ordinance for exercising and enforcing this provision. And provided further that in all cases in which the attendance of witnesses may be compelled for the investigation of any charges as aforesaid, any member of the council shall have power to administer the requisite oaths; and such council shall have such power to compel the giving of testimony by the attending witnesses as is conferred on courts of justice. In all such cases witnesses shall be entitled to the same privileges, immunities and compensation as are allowed witnesses in civil cases, and the costs of all such

proceedings shall be payable out of the general fund of the municipal corporation. [1904, April 25, 97 v. 385.]

(1) **Old section.**—Compare old § 1685 R. S., repealed, providing for removal of officers by vote of council. And see §§ 1732 to 1736 R. S. inclusive, relating to removal of officers by Probate Court, in Part II.

**Other provisions relating to removals.**—

*Generally; by heads of departments,* § 129 of the Code.

*In department of public service.*—Power to remove all officers, employes, etc., appointed by the board, given to the board, § 129 of the Code. Cause for removal must be such as is satisfactory to directors. § 145 of the Code.

*In department of public safety.*—Members of board, causes for removal and method, § 156 of the Code. Officers, employes, etc., appointed by board, cause for removal (conviction of crime), § 160; method of removal (board to provide rules), § 161; filing of charges by mayor, § 167; appeal to board from mayor, § 186; power to remove, § 129.

*Under Council,* §§ 118 and 195 of the Code.

*Under University Board,* § 217 of the Code.

*Under Library Board,* § 218 of the Code.

*Under Board of Health,* § 2115 R. S., re-enacted in § 189 of the Code.

*Suspensions;* of deputies, officers, etc., by chief of police and fire chief; of chiefs, by mayor. § 152.

*Removals by Probate Court.*—§§ 1732 to 1736 R. S. inclusive, under OFFICERS in Part II.

**Legislative power to provide for removal.**—The power given to the legislature to provide for the organization of municipalities carries with it, as an incident to its exercise, the power to provide a mode of removal of officers. *State v. Hawkins*, 44 O. S. 98, 110.

The legislature alone can determine the causes for which an elective officer may be removed. *State v. Ganson*, 58 O. S. 313.

**Character of power.**—The power to remove officers is not necessarily a judicial power, and may be conferred by the legislature upon legislative bodies and executive officers. *Dorgan v. Columbus*, 12 Dec. 121, 123.

The power to remove, given to a board or officer, cannot be delegated. *Kelley v. Cincinnati*, 7 N. P. 360.

The removal of officers and heads of departments does not affect subordinates or give the removing board power to remove such subordinates. *State v. Hudson*, 44 O. S. 137.

(2) **What officers.**—The phrase “head of any department or officer” does not include city councilmen. *Cleveland Illuminating Co. v. Hitchens et al.*, 15 Dec. 522; 3 N. P. (N. S.) 57. (Aff’d Cir. Ct. no rep.) Councilmen may be removed from office in manner provided in Sec. 1732 R. S. *et seq.* (p. 557). *Ib.*

**Definitions.**—Misfeasance is doing a lawful act in an improper manner. *Colburn v. Newfarth*, 16 B. 54.

Malfeasance is doing a wrongful act, such as approving fraudulent bills, purchasing property for private use, etc. *Ib.*

Misconstruction of a statute, about which there might be a difference in opinion, would not be evidence of incompetency. *State v. Hoglean*, 64 O. S. 532.

Misconduct in office means as such officer and not otherwise. *Graham v. Stein*, 18 C. C. 770.

Misconduct in office, defined. *State v. Bair*, 50 B. 11.

Where an officer commits an offence for which he may be indicted,

but which does not touch his particular character as such officer, he ought not to be removed until he has been indicted and convicted criminally. *Graham v. Stein*, 18 C. C. 770; *State v. Chapman*, 11 O. 430.

Incompetency in a legal sense means a lack of fitness to discharge the duties of the position, and official delinquency or corruption would be a disqualification rendering an officer incompetent. *State v. Fire Commissioners*, 26 O. S. 24.

Misconduct implies wantonness and not honest mistakes. *State ex rel. v. Roll*, 7 W. L. J. 121.

**Statutory causes and method exclusive.**—Where the legislature has prescribed by statute the causes for removal of officers and also provided the mode of procedure to accomplish the removal, the enumeration in the statutes of the causes of removal, excludes every other cause. *Dorgan v. Columbus*, 12 Dec. 121.

And the method provided by the statute is exclusive. *Dorgan v. Columbus*, 12 Dec. 121, 123; *State v. Ganson*, 58 O. S. 313.

The statutory method of removal being exclusive, *quo warranto* will not lie. *State v. Ganson*, 58 O. S. 313.

(3) **Charges.**—Charges preferred against a public officer upon which his removal is sought, must be specific, and state facts and not mere conclusions. *Kerr v. Hinkle*, 12 Dec. 365.

As to definiteness of charges, see *State ex rel. v. Barrett*, 22 C. C. 104.

When a public officer may be removed for specific causes, such facts must be stated as in judgment of law constitute the cause relied on, and an opportunity afforded the officer to be heard before he can be legally removed. *State v. Hoglan*,

64 O. S. 532; *State v. Sullivan*, 58 O. S. 504.

Incompetency charged need not have been shown by acts during the term in which the officer was removed, but may have been evidenced by acts during a previous term. *State v. Fire Commissioners*, 26 O. S. 24.

A charge setting out facts showing that the officer cursed the board and refused to come to order, would amount to a charge of "misconduct in office." *State ex rel. v. Sutton*, 4 B. 608.

It is not necessary that the word "incompetency" be used in the charge, when this is the ground, if acts evidencing incompetency, are shown. *State v. Fire Commissioners*, 26 O. S. 24.

(4) **Notice.**—Where notice is required, a removal without notice is a nullity and the effect is to leave the charges pending. *State ex rel. v. Sutton*, 4 B. 608.

As to what is notice within reasonable time. *Ib.*

Where the officer appears before the trial board and asks investigation, he waives any notice that may be required, and gives the board jurisdiction. *State ex rel. v. Fire Commissioners*, 26 O. S. 24.

(5) **Proceedings in trial.**—A finding "from the evidence and also from facts within personal knowledge" is not a proper exercise of power, unless the facts are shown and an opportunity to refute them given. *State v. Sullivan*, 58 O. S. 504, 516.

The power to suspend pending proceedings in trial is not incident to the power to remove, but must be expressly given. *State ex rel. v. Sutton*, 4 B. 608.

As to degree of proof necessary to establish misfeasance or malfeasance



in office, see *Colburn v. Neufarth*, 16 B. 54.

**(6) Remedies of officer. —**

Where power to remove is conferred on executive officer by law, injunction will not lie at suit of party to be removed to restrain the removal. *Kerr v. Hinkle*, 12 Dec. 365; *Littleton v. Infirmary Directors*, 18 C. C. 891; but see *Weber v. Bishop*, 4 B. 775, 777.

Courts will not interfere by injunction to prevent removal of an officer on the ground that the officials charged with authority to hear and determine the charges and make removal, are acting from improper motives. *Reeves v. Griffin*, 29 B. 281.

Or, on the ground that the statute under which the trial board holds office is unconstitutional. *Ib.*

Trial cannot be enjoined on the ground of hostility of the investigating committee. *Miller v. Directors*, 4 B. 690.

The officer, in case of removal

wrongfully has a remedy by mandamus to compel reinstatement. *Reeves v. Griffin*, 29 B. 281.

But the action of a board in removing an officer for incompetency, is an exercise of discretion vested in the board, and such action cannot be reviewed in a suit in mandamus to compel reinstatement. *State ex rel. v. Fire Commissioners*, 26 O. S. 24, 27.

An injunction may be allowed at the suit of a taxpayer to restrain council from illegally removing an officer, as such step would involve an expenditure of money and would be an abuse of corporate power. *Dorgan v. Columbus*, 12 Dec. 121.

Courts will not pass upon the sufficiency of the facts upon which charges are made for the removal of public officers. *State v. Hawkins*, 44 O. S. 98; *State v. Bryson*, 44 O. S. 457; *State v. McClain*, 58 O. S. 313; *State v. Sullivan*, 58 O. S. 504; *State v. Hoglan*, 64 O. S. 532.

**Sec. 226. [Removal of mayor by governor of state.]** In

case of misconduct in office, or bribery, or any gross neglect of duty, gross immorality or habitual drunkenness<sup>1</sup> of any mayor, the governor of the state shall remove him from office, upon notice and after affording to the said mayor, a full and fair opportunity to be heard in his defense.<sup>2</sup> The proceedings for his removal shall be commenced by the governor putting on file in his office, a written statement of the alleged causes for the mayor's removal, and he shall cause a copy of said statement to be served upon the mayor not less than ten days before the hearing of the matter. The proceedings had by the governor upon such removal shall be public and a full detailed statement of the reasons of such removal shall be filed by the governor in the office of the secretary of state and shall be made

a matter of public record therein. The decision of the governor, when so filed, with the reasons therefor, shall be final and pending such investigation by the governor, he may suspend the mayor for a period of thirty days.

(1) **Statutory causes and method exclusive.**—The causes for removal and method of procedure given in the statute, exclude all others. *Dorgan v. Columbus*, 12 Dec. 121; *State v. Ganson*, 58 O. S. 313.

**Misconduct** means misconduct

as such officer, and not otherwise. *Graham v. Stein*, 18 C. C. 770.

**Validity**, see Opinion, 50 B. 114.

(2) See generally, for matters relating to nature of power of removal, notice, remedies, etc., notes under § 225 *supra*.

**Sec. 227.** [Council shall determine number, compensation and amount of bond of officers, clerks and employes in any department of city government; exception.] Except in the department of public service, council shall by ordinance or resolution, except as otherwise provided in this act,<sup>1</sup> determine the number of officers, clerks and employes in any department of the city government,<sup>2</sup> and shall fix by ordinance or resolution their respective salaries<sup>3</sup> and compensation and the amount of bond to be given for each officer, clerk or employe in any department of the city government, if any be required, and said bonds shall be made by such officer, clerk or employe with surety subject to the approval of the mayor of said city.

(1) **Other exceptions.**—As to board of health, see § 189 of the Code and sections of R. S. therein re-enacted; university directors, § 217; library trustees, § 218; trustees of public affairs in villages, § 2409 R. S., re-enacted in § 205 of the Code, page 459.

(2) **Combining offices** or appointments, see note (2) to § 128 of the Code, page 328.

**Village council to fix salaries, etc.**—See §§ 195 and 197 of the Code, page 445.

(3) **Character of salary.**—Salary is not a property right of an officer and injunction will not lie to protect it. *Reeves v. Griffin*, 29 B. 281.

**Liability for salaries** of employes, fixed by an ordinance does not attach to the municipality unless services are actually performed, and this even though they are permitted to report for duty and are not discharged or removed. *State v. Philbrick*, 13 Dec. 158.

**Officer suspended** is not entitled

to salary during time of suspension. *Steubenville v. Culp*, 38 O. S. 18.

**Officer not qualifying.**—An officer who has not qualified is not entitled to salary. *State ex rel. v. Eshelby*, 2 C. C. 468.

**De facto officer** is not entitled to maintain an action for the salary of the office for the period of his service. *Ermston v. Cincinnati*, 7 N. P. 635; *State ex rel. v. Newark*, 6 N. P. 523; *Knorr v. Bd. of Ed.*, 9 B. 182. But see *Cincinnati v. Green*, 2 C. S. C. R. 278.

But if a municipality has already paid a *de facto* officer the salary for the time he served, it cannot be compelled to pay a *de jure* officer, who ousts the incumbent, for the same period. *State v. Eshelby*, 2 C. C. 468.

**Where no salary fixed.**—There are no fees or salaries attached to an office except such as are prescribed by statute or ordinance. If no fees or salary have been fixed, the person filling the office cannot claim compensation, even though his services were rendered at the request of a superior. *Halpin v. Cin-*

*cinnati*, 2 Gaz. 386. *Lease's Claim*, 4 C. C. 3; *Strawn v. Commissioners*, 47 O. S. 404, 408; *Clark v. Commissioners*, 58 O. S. 107; *Butler Co. v. Welliver*, 12 C. C. 440; *Clark v. Lucas Co.*, 14 C. C. 349; *Tuall v. Lucas Co.*, 3 N. P. 112.

And if paid for services where no compensation is provided for the office, the money paid may be recovered back. *Swartz v. Wayne Co.*, 35 B. 275; *Jones v. Commissioners*, 57 O. S. 189.

**Extra compensation.**—Where salaries and fees are regulated, officer cannot charge for other services or claim any fees by implication. *Debolt v. Cincinnati Township*, 7 O. S. 237.

**Recovery of overpayment.**—As to how overpayment to officer may be recovered, see *Jones v. Commissioners*, 57 O. S. 189; *Ridenour v. State*, 14 C. C. 393, 400; *State v. Brown*, 20 C. C. 57.

**Construction of ordinance.**—For construction of ordinances fixing salaries under previous laws, see *Hatch v. Cincinnati*, 17 O. S. 48.

## FORM OF GENERAL ORDINANCE FIXING SALARIES AND BONDS OF OFFICERS AND ORGANIZING DEPARTMENTS.

Ordinance No. ....

To fix the salaries and bonds of certain officers, to determine the number of assistants, clerks and employes in certain departments and to fix their salaries and bonds.

Be it ordained by the council of the city of....., State of Ohio:

Sec. 1. (Mayor's office). That the salary of the mayor shall be..... dollars per annum, payable....., and he shall give bond in the sum of.....dollars. In the office of the mayor there shall be one secretary, one clerk, one stenographer and one messenger, who shall be appointed by the mayor, and perform such appropriate duties relating to



the mayor's office as shall from time to time be assigned by him. They shall receive the following salaries, payable.....

Secretary.....dollars per annum.

Etc., etc.

Sec. 2. (Auditor's office.)

(Add sections for other departments desired to be provided for.)

Sec. 3. That all ordinances or parts of ordinances inconsistent herewith be repealed and this ordinance take effect from and after the earliest period allowed by law.

Passed.....19.....

.....  
President of Council.

Attest:

.....  
Clerk.

NOTE: The above form of ordinance may be used in fixing salaries and bonds and in organizing all departments of the city service for which council is authorized to provide. The number of employes and salaries in the departments of public service, health, university and library are within the exclusive control of the officers in charge thereof. See §§ 145, 189, 217 and 218 of the Code, and § 2115 R. S., re-enacted in § 189 of the Code.

Changes made in salaries already fixed will not go into effect until the expiration of existing terms of the officers affected. (§ 126.)

**Sec. 228. [Vacancies; how filled.]**<sup>1</sup> In case of death, resignation, removal or disability of any officer or director in any department of any municipality, the mayor of such city shall fill the vacancy by appointment, and said appointment shall continue for the unexpired term and until a successor shall be duly elected and qualified, or until such disability is removed.<sup>2</sup> [1904, April 7, 97 v. 78.]

(1) **Old section.**—Compare old § 1713 R. S., repealed.

(2) **When vacancy occurs.**—Where the law provides that an elective officer's term continues until his successor is elected and qualified, if a successor is not regularly elected, a vacancy is not created, which can be filled by appointment,

but the incumbent holds over. *State ex rel. v. Wright*, 56 O. S. 540, 554; *State ex rel. v. Kearns*, 47 O. S. 566.

And the incumbent holds over even though he was an appointee to fill a vacancy. *State ex rel. v. Darby*, 12 C. C. 235 (aff'd 52 O. S. 611). But see *State v. Corey*, 4 W. L. M. 563.

Death before beginning of term, but after election and qualifying would create a vacancy. *State ex rel. v. McGregor*, 44 O. S. 628. But such vacancy does not begin until end of term of incumbent. *State ex rel. v. Dahl*, 55 O. S. 195.

But death on election day, before the polls are closed would not create a vacancy. *State ex rel. v. Speidel*, 62 O. S. 156.

Council, though given the right to judge of the election and qualification of its own members, has not the power to decide whether there is any vacancy or office to be filled. *State ex rel. v. Darby*, 12 C. C. 235 (aff'd 52 O. S. 611).

When the appointment to an office is a nullity for the reason that the appointee is by statute ineligible to such office, a legal appointment to such office may be made, without first ousting such first appointee by

proceedings in *quo warranto*. *State ex rel. v. Craig*, 69 O. S., 236.

**Vacancy by resignation**, occurs at date of resignation, and not when resignation is accepted. *Reiter v. State*, 51 O. S. 74.

**No vacancy where incumbent can hold over.**—There is no vacancy as long as there is an incumbent who can legally hold over until his successor is elected and qualified. *State ex rel. v. McCracken*, 51 O. S. 123, 129; *State ex rel. v. Thompson*, 9 C. C. 161.

**Term of appointee.**—Compare § 11 R. S. under OFFICERS in Part II. The fact that the commission was made out for the wrong period of time, will not abridge or extend the term of the appointee to vacancy. *State ex rel. v. Darby*, 12 C. C. 235 (aff'd 52 O. S. 611); *State ex rel. v. Slough*, 12 C. C. 105, 111.

**Sec. 229.** [Declaration of unconstitutionality of one section of this act shall not affect validity of any other section not so held invalid.] In the event that any section or part of a section included within the provisions of this act shall be held by any court to be invalid or unconstitutional, such decision shall not be held to invalidate or impair the validity, force or effect of any other section or part of a section of this act, except the section or part of a section so held invalid or unconstitutional by such court.<sup>1</sup>

(1) **Effect of unconstitutionality of part of an act.**—The rule as to the effect of the unconstitutionality of a particular section or part of an act upon other sections of the same act, is that if the unconstitutional part is so inseparably connected with other sections as to raise a presumption that the legislature would not have passed the latter without the former, all sections so connected are void. *State v. Perry Co.*, 5 O. S. 497; *Monroe v. Collins*, 17 O. S. 665, 684; *Bowles v. State*, 37 O. S. 35; *Exchange Bank v. Hines*,

3 O. S. 1; *Taylor v. Ross Co.*, 23 O. S. 22; *R. R. v. Commissioners*, 31 O. S. 338; *Treasurer v. Bank*, 47 O. S. 503; *State v. Frame*, 39 O. S. 399; *State v. Buckley*, 60 O. S. 273. See also *Stevens v. State*, 61 O. S. 597; *State v. Kinney*, 56 O. S. 721; *Pump v. Commissioners*, 69 O. S. 448.

The rejection of some of the provisions of a statute for unconstitutionality, will not vary the sense or meaning of its remaining provisions, which are to be construed as well in the light of those rejected, as of those which remain. *State v. Dombaugh*, 20 O. S. 167.

**Sec. 230.** [Election and term of police judge and clerk; vacancies in office of; how filled.] Except where otherwise provided in the acts creating police courts and fixing the terms of judges and clerks thereof, which acts are herein made to remain in full force and effect, such judges and clerks shall be elected in each municipality where such officers are now provided for by law, at the first election held under this act on the first Monday in April, 1903, for terms of three years, and thereafter their successors shall be elected for a like term; and except as otherwise provided in the acts creating said courts, vacancies in the office of judge of the police court shall be filled by the governor for the unexpired term, and vacancies in the office of clerk of the police court shall be filled by the mayor for the unexpired term.<sup>1</sup>

(1) See §§ 190, 191, 192 (city of the Code (village police courts) police courts) and §§ 208, 209, 210 and notes under such sections.

**Sec. 231.** [When this act shall take effect.] For the purpose of carrying into effect the powers and duties conferred and imposed upon present councils, boards of legislation, or other legislative bodies, by the provisions of this act, and for the purpose of conducting the first election to be held in every municipality hereunder, and of preparing for the change in the organization of municipalities herein provided for, this act shall take effect from and after the fifteenth day of November, 1902; and for all other purposes this act, and every portion of the same, including the repeal of existing laws, shall take effect on the first Monday in May, 1903,<sup>1</sup> and the following sections of the Revised Statutes of Ohio are hereby repealed:

(1) **When repeals go into effect.**—A statute providing that it shall “go into effect on May 1st next,” postpones the repealing clause as well as its general provisions. *McArthur v. Franklin*, 16 O. S. 193.

Repealing clause of new Code does not go into effect until the first Monday in May, 1903. *State v. Barr*, 13 Dec. 382.

Effect on curative provisions in §§ 31 and 137 of the Code, see *Horstman v. St. Ry. Co.*, 13 Dec. 378.

*When status of municipalities changed.*—The status of cities and villages and their governments was not changed by the municipal code until after the April election following the passage of the Code. *Pollock v. Toland*, 25 C. C. 75.



**Repeals.** 1537-1, 1538, 1539, 1540, 1541, 1542, 1543, 1545, 1545-1, 1545-2, 1545-3, 1545-4, 1545-5, 1545-6, 1545-7, 1545-8, 1545-9, 1545-10, 1545-11, 1545-12, 1545-13, 1545-14, 1545-15, 1545-16, 1545-17, 1545-18, 1545-19, 1545-20, 1545-21, 1545-22, 1545-23, 1545-24, 1545-25, 1545-26, 1545-27, 1545-28, 1545-29, 1545-30, 1545-31, 1545-32, 1545-33, 1545-34, 1545-35, 1545-36, 1545-37, 1545-38, 1545-39, 1545-40, 1545-41, 1545-42, 1545-43, 1545-43*a*, 1545-43*b*, 1545-44, 1545-45, 1545-46, 1545-47, 1545-48, 1545-49, 1545-50, 1545-51, 1545-52, 1545-53, 1545-54, 1545-55, 1545-56, 1545-57, 1545-58, 1545-59, 1545-60, 1545-61, 1545-62, 1545-63, 1545-64, 1545-65, 1545-66, 1545-67, 1545-68, 1545-69, 1545-70, 1545-71, 1545-72, 1545-73, 1545-74, 1545-75, 1545-76, 1545-77, 1545-78, 1545-79, 1545-80, 1545-81, 1545-82, 1545-83, 1545-84, 1545-85, 1545-86, 1545-87, 1545-88, 1545-88*a*, 1545-88*b*, 1545-89, 1545-90, 1545-91, 1545-92, 1545-93, 1545-94, 1545-95, 1545-96, 1545-97, 1545-98, 1545-99, 1545-100, 1545-101, 1545-102, 1545-103, 1545-104, 1545-105, 1545-106, 1545-107, 1545-108, 1545-109, 1545-110, 1545-111, 1545-112, 1545-113, 1545-114, 1545-115, 1545-116, 1545-117, 1545-118, 1545-119, 1545-120, 1545-121, 1545-122, 1545-123, 1545-124, 1545-125, 1545-126, 1545-127, 1545-128, 1545-129, 1545-130, 1545-131, 1545-132, 1545-133, 1545-134, 1545-135, 1545-136, 1545-137, 1545-138, 1545-139, 1545-140, 1545-141, 1545-142, 1545-142*a*, 1545-143, 1545-144, 1545-145, 1545-146, 1545-147, 1545-148, 1545-149, 1545-150, 1545-151, 1545-152, 1545-153, 1545-154, 1545-155, 1545-156, 1545-157, 1545-158, 1545-159, 1545-160, 1545-161, 1545-162, 1545-163, 1545-164, 1545-165, 1545-165*a*, 1545-165*b*, 1545-165*c*, 1545-165*d*, 1545-165*e*, 1545-165*f*, 1545-165*g*, 1545-165*h*, 1545-165*i*, 1545-166, 1545-167, 1545-168, 1545-169, 1545-170, 1545-171, 1545-172, 1545-173, 1545-174, 1545-175, 1545-176, 1545-177, 1545-178, 1545-179, 1545-180, 1545-181, 1545-182, 1545-183, 1545-184, 1545-185, 1545-186, 1545-187, 1545-188, 1545-189, 1545-190, 1545-191, 1545-192, 1545-193, 1545-194, 1545-195, 1545-196, 1545-197, 1545-198, 1545-199, 1545-200, 1545-201, 1545-202, 1545-203, 1545-204, 1545-205, 1545-206, 1545-207, 1545-208, 1545-209, 1545-210, 1545-211, 1545-212, 1545-213, 1545-214, 1545-215, 1545-216, 1545-217, 1545-218, 1545-219, 1545-220, 1545-221, 1545-222, 1545-223, 1545-224, 1545-225, 1545-226, 1545-227, 1545-228, 1545-229, 1545-230, 1545-231, 1545-232, 1545-233, 1545-234, 1545-235, 1535-236, 1545-237, 1545-238, 1545-239, 1545-240, 1545-241, 1545-242, 1545-243, 1545-244, 1545-245, 1545-246, 1545-247, 1545-248, 1545-249, 1545-250, 1545-251,

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 2729-10, 2729-11, 3471-4, 3471-4*a*, 2113, 2133, 3438.

And the following acts are repealed:

An act entitled, "An act to supplement section 2729*a* of the Revised Statutes, passed January 29, 1885," passed February 4, 1902 (95 O. L. pp. 5-6).

An act entitled, "An act to supplement section 1692 of the Revised Statutes of Ohio by adding thereto, subsection 41," passed February 20, 1902 (95 O. L. pp. 16-17).

An act entitled, "An act to amend section 2267 of the Revised Statutes of Ohio," passed March 4, 1902 (95 O. L. pp. 35-36).

An act entitled, "An act to amend section 2397 of the Revised Statutes of Ohio, and to supplement said section by adding thereto section 2379a," passed March 25, 1902 (95 O. L. p. 67).

An act entitled, "An act to authorize the council of any city of the fourth grade, second class, which at the last federal census had a population exceeding 16,000, to issue and sell bonds to enlarge and extend waterworks," passed March 26, 1902 (95 O. L. pp. 68-69).

An act entitled, "An act to further supplement section 1692 of the Revised Statutes of Ohio," passed April 1, 1902 (95 O. L. p. 78).

An act entitled, "An act to amend section 2440 of the Revised Statutes of Ohio," passed April 2, 1902 (95 O. L. pp. 83-84).

An act entitled, "An act to amend section 2232 of the Revised Statutes of Ohio," passed April 14, 1902 (95 O. L. 131).

An act entitled, "An act to supplement section 2476-27 of the Revised Statutes of Ohio," passed April 15, 1902 (95 O. L. pp. 143-144).

An act entitled, "An act to amend section 1707d-32 of the Revised Statutes of Ohio as amended March 11, 1898 (Vol. 93 O. L., page 44)" passed April 15, 1902 (95 O. L., p. 148).

An act entitled, "An act to amend, supplement and repeal certain sections of subdivision 3, of chapter 5, division 5, title 12, of the Revised Statutes of Ohio," passed April 17, 1902 (95 O. L. pp. 203, 204, 205, 206).

An act entitled, "An act to amend section 1708a of the Revised Statutes of Ohio," passed April 17, 1902 (95 O. L. pp. 206-207).

An act entitled, "An act to amend section 1 of an act entitled, 'An act to provide for the construction of sewers in cities of the third grade of the second class, having a board of public affairs,' passed April 15, 1889 (O. L. Vol. 86, p. 360), as amended April 18, 1896 (O. L. Vol. 92, p. 197)," passed April 23, 1902 (95 O. L. p. 236).

An act entitled, "An act to amend section 2406-95 of the Revised Statutes," passed April 23, 1902 (95 O. L. 239).

An act entitled, "An act to supplement section 2709 of



the Revised Statutes of Ohio, with sectional numbering 2709-1," passed April 23, 1902 (95 O. L. pp. 242-243).

An act entitled, "An act to amend section 1709*a* of the Revised Statutes of Ohio," passed April 23, 1902 (95 O. L. pp. 247-248).

An act entitled, "An act to amend supplemental section 2823*a* of the Revised Statutes of Ohio as passed April 17, 1891 (88 O. L. 318), relating to the levy of taxes by county commissioners in counties containing cities of the first grade, second class, and providing that such commissioners shall apportion such levy to separate funds," passed April 23, 1902 (95 O. L. p. 255).

An act entitled, "An act to supplement section 2701 of the Revised Statutes of Ohio," passed April 23, 1902 (95 O. L. p. 256).

An act entitled, "An act to supplement section 2167-3 of the Revised Statutes of Ohio," passed April 23, 1902 (95 O. L. p. 259).

An act entitled, "An act to supplement section 2505*c* of the Revised Statutes of Ohio," passed April 25, 1902 (95 O. L., p. 264).

An act entitled, "An act to amend sections 2476-17 and 2476-18 of the Revised Statutes of Ohio," passed April 25, 1902 (95 O. L., pp. 265-266).

An act entitled, "An act to further supplement sections 1545-89, to 1545-165 inclusive of the Revised Statutes of Ohio," passed April 25, 1902 (95 O. L., pp. 266-267-268-269-270).

An act entitled, "An act to authorize cities of the second class, fourth grade, to issue bonds for cemetery purposes," passed April 23, 1902 (95 O. L., 244).

An act entitled, "An act to supplement section 1692 of the Revised Statutes of Ohio," passed April 25, 1902 (95 O. L., 274).

An act entitled, "An act to provide for the merging, maintenance and government of public libraries in cities of the second class, fourth grade," passed April 29, 1902 (95 O. L., pp. 317-318).

An act entitled, "An act to supplement section 2667 of the Revised Statutes of Ohio," passed April 30, 1902 (95 O. L., p. 332).

An act entitled, "An act to amend section 1545-276 of the Revised Statutes of Ohio," passed May 2, 1902 (95 O. L., pp. 339-340).

An act entitled, "An act to amend section 2100a of the Revised Statutes of Ohio," passed May 2, 1902 (95 O. L., 349).

An act entitled, "An act to amend section 1699-3 of the Revised Statutes of Ohio," passed May 2, 1902 (95 O. L., 356).

An act entitled, "An act to amend section 1831 of the Revised Statutes of Ohio," passed May 2, 1902 (95 O. L., pp. 353-354).

An act entitled, "An act to amend section 1895 of the Revised Statutes of Ohio," passed May 6, 1902 (95 O. L., p. 363).

An act entitled, "An act to amend section (1545-282) (1) Sec. 15, relative to rate of taxation in certain cities," passed May 6, 1902 (95 O. L., pp. 367-368).

An act entitled, "An act to supplement sections 1655 and 1708 of the Revised Statutes of Ohio," passed May 6, 1902 (95 O. L., pp. 380-381-382-383-384-385-386-387-388).

An act entitled, "An act to supplement section 1569 of the Revised Statutes," passed May 7, 1902 (95 O. L., pp. 411-412).

An act entitled, "An act to further supplement section 2334 of the Revised Statutes of Ohio," passed May 7, 1902 (95 O. L., p. 416).

An act entitled, "An act to authorize cities to issue bonds for park purposes," passed May 7, 1902 (95 O. L., 438).

An act entitled, "An act to amend section 1655a of the Revised Statutes of Ohio," passed May 9, 1902 (95 O. L., pp. 457-458-459).

An act entitled, "An act to further supplement section 1709 of the Revised Statutes of Ohio," passed May 9, 1902 (95 O. L., 447).

An act entitled, "An act to supplement section 2408 of the Revised Statutes of Ohio with supplementary section 2408a," passed May 10, 1902 (95 O. L., pp. 485-486).

An act entitled, "An act to amend section 2689a of the Revised Statutes of the state of Ohio," passed May 10, 1902 (95 O. L., pp. 508-509-510).

An act entitled, "An act to amend section 1692f (2) of the Revised Statutes of Ohio," passed May 10, 1902 (95 O. L., pp. 526-527).

An act entitled, "An act to amend section 1939 of the Revised Statutes of Ohio," passed May 10, 1902 (95 O. L., p. 532).

An act entitled, "An act to amend section 1788 of the Re-

vised Statutes of Ohio," passed May 10, 1902 (95 O. L., p. 535).

An act entitled, "An act to further supplement section 1692 of the Revised Statutes of Ohio," passed May 10, 1902 (95 O. L., p. 561).

An act entitled, "An act to amend section 2408 of the Revised Statutes as amended April 11, 1890 (— Ohio L. 172)," passed May 12, 1902 (95 O. L., pp. 562-563)).

An act entitled, "An act to amend section 2683 of the Revised Statutes of the state of Ohio, to authorize tax levies for special purposes," passed May 12, 1902 (95 O. L., 570).

An act entitled, "An act to amend section 1545-276 of the Revised Statutes of Ohio as amended May 2, 1902," passed May 12, 1902 (95 O. L., pp. 589-590).

An act entitled, "An act to amend section 1946 of the Revised Statutes of Ohio," passed May 12, 1902 (95 O. L. pp. 594, 595).

An act entitled, "An act to further supplement section 2330 of the Revised Statutes of Ohio," passed May 12, 1902 (95 O. L. 604).

An act entitled, "An act to further supplement section 1692 of the Revised Statutes of Ohio," passed May 12, 1902 (95 O. L. 561).

An act entitled, "An act to further supplement section 2330 of the Revised Statutes of Ohio," passed May 12, 1902 (95 O. L. 604).

An act entitled, "An act to provide for certain contracts in regard to bridges between cities of the second grade of the second class and street railroad purposes," passed April 25, 1902 (95 O. L., p. 806).

An act entitled, "An act to provide for bridge bonds for cities of the second grade of the second class, passed March 12, 1902 (95 O. L., pages 696, 697 and 698).

This act shall supersede all acts and parts of acts, not herein expressly repealed, which are inconsistent herewith.<sup>2</sup>

**(2) Repeals by implication.—**

*Not favored.*—Ludlow v. Johnston, 3 O. 553; Dodge v. Gridley, 10 O. 173; Raudebaugh v. Shelley, 6 O. S. 307; Buckingham v. R. R. 10 O. S. 25; Gallup v. Lorain Co., 20 O. S. 324; State *ex rel.* v. Franklin Co., 20 O. S. 421; Ruffner v. Hamilton Co., 1 Disney, 39.

*General revision as a substitute* repeals former statutes by implication. Lorain Plank Rd. v. Cotton, 12 O. S. 263; Moore v. Vance, 1 O. 1; Shelby Co. v. Frego, 26 O. S. 488; State v. Craig, 22 C. C. 217.

*Later Contradictory Statute* repeals earlier by implication. Work v. Massie, 6 O. 503; Pierce v. Bd.



of Ed., 1 N. P. 286, 289; Met. Tr. Co. v. Ry. Co., 12 O. F. D. 584.

*Special act by general law* not repealed by implication unless necessary to give meaning to later enactment. Fosdick v. Perrysburg, 14 O. S. 472; Shunk v. First Natl. Bank, 22 O. S. 508, 515; State v. Kelley, 25 O. S. 29, 33; State v. Newton, 26 O. S. 200; Commissioners v. Bd. P. W. 39 O. S. 628; State *ex rel.* v. Davis, 23 O. S. 434; Knox Co. v. McComb, 19 O. S. 320; *Ex*

*parte* Van Hagan, 25 O. S. 426; White v. State, 11 Dec. 794.

*General law by, special act* repealed by implication where the two are irreconcilable. Pease v. Ryan, 7 C. C. 44; Wright v. Munger, 5 O. 441; Thomas v. Evans, 73 O. S. 140.

See notes under § 212 of the Code, page 478.

"Inconsistent herewith"—meaning of, see State *ex rel.* v. Craig, 22 C. C. 441.



# RELATED STATUTES

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## I

### OFFICERS.

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#### 1. GENERAL PROVISIONS.

**Sec. 1 R. S.** [Oath includes affirmation.] The word oath includes affirmation; and, whenever an oath is required or authorized by law, an affirmation, in lieu thereof, may be taken by any person having conscientious scruples to taking an oath; and an affirmation has the same force and effect as an oath.<sup>1</sup> [51 v. 57, § 596; (S. & C. 1130).]

(1) **Who may administer oaths.**      **When oath binding.**— See Brock —See *Harmon v. Stockwell*, 9 O. 93;    *v. Milligan*, 10 O. 121.  
*Warwick v. State*, 25 O. S. 21.

**Sec. 2 R. S.** [All officers must take an oath of office.] Each person chosen or appointed to an office under the constitution or laws of the state, and each deputy or clerk of such officer, shall, before entering upon the discharge of his duties, take an oath of office,<sup>1</sup> but the failure to take such oath does not affect his liability or the liability of his sureties.<sup>2</sup>

(1) See § 1737 R. S., under § 224      (2) See § 1740 R. S. under § 224  
of the Code, and notes, p. 502.      of the Code, and notes, p. 507.

**Sec. 3 R. S.** [Oath of office of judges; oath of office of other officers.] The oath of office of each judge of a court of record shall be, to support the constitution of the United States and the constitution of this state, and to administer justice without respect to persons, and faithfully and impartially to discharge and perform all the duties incumbent on him as such judge,



according to the best of his ability and understanding; and the oath of office of every other officer, deputy, or clerk, shall be, to support the constitution of the United States and the constitution of this state, and faithfully to discharge the duties of his office.<sup>1</sup> [50 v. 67, § 19; (S. & C. 381).]

(1) **Form of oath.**—See notes to § 1737 R. S., re-enacted in § 224 of the Code, p. 502.

**Sec. 4 R. S. [Seal; of what it may consist.]** Wherever an official or a corporate seal<sup>1</sup> is required to be affixed to any instrument of writing, an impression of such seal upon either wax, wafer or other adhesive substance, or upon the paper or material on which such instrument is written, shall be alike valid and sufficient; private seals are abolished, and the affixing of what has been known as a private seal to any instrument whatsoever, shall not give such instrument any additional force or effect, or in any way change the construction thereof. [1884, April 14: 81 v. 198; 80 v. 79; Rev. Stat. 1880; 29 v. 349, § 1; (S. & C. 1385).]

(1) **Corporate seal of municipality.** See note (3) to § 7 of the Code, page 43.

**Sec. 5 R. S. [Depositaries of official bonds must record them; a certified copy of the record made evidence.]** Every officer,<sup>1</sup> on receiving an official bond which by law is required to be filed or deposited with him, shall immediately, on receiving such bond, record the same in a book to be kept by him for that purpose; and a certified transcript of the record of any such bond shall be taken and held, in all courts and places, as conclusive evidence of such record, and *prima facie* evidence of the execution and existence of such bond. [41 v. 13, § 1; (S. & C. 192).]

(1) **Bonds of municipal officers.**—See § 1738 R. S. (re-enacted in § 224 of the Code) and notes thereunder, p. 504.

**Filing bonds of municipal officers.**—See § 1738 R. S. (re-enacted in § 224 of the Code) and notes thereunder, p. 504.

**Sec. 6 R. S. [What bonds good when signed in blank.]** All official bonds, and all bonds of executors, administrators, guardians and trustees, and all bonds required or authorized to be taken by or before any court, judge, public board or officer, judicial or ministerial, and all bonds of indemnity, and all other bonds conditioned to become void upon the performance

by the parties thereto, or any of them, of the stipulations therein contained, shall bind and render liable thereon all the obligors therein, both principals and sureties, whether at the time of the signing of the same by such obligors, or any of them, the amounts of such bonds to be filled in or left in blank, if such amounts be filled in before, or at the time of the approval or acceptance of such bond; and such filling in may be done in the absence of any or all of the obligors, and without any express authority for that purpose from them or any of them.<sup>1</sup> [1883, March 29: 80 v. 79; Rev. Stat. 1880; 66 v. 15; §§ 1, 2.]

(1) **Effect of blanks.**—See § McLain v. Simington, 37 O. S. 484; 1738 R. S. (re-enacted in § 224 of Partridge v. Jones, 38 O. S. 375. Code) and notes thereunder, p. 504. See also early cases of State v. Bor-

**What blanks may be filled.**—ing, 15 O. 507; Famulener v. Anderson v. Allmen, 19 O. S. 485; Anderson, 15 O. S. 473.

**Sec. 7 R. S.** [What is sufficient as the condition of an official or public bond.] A bond payable to the state of Ohio, or other payee as may be directed by law, reciting the election or appointment of a person to an office or public trust under or in pursuance of the constitution or laws, and conditioned for the faithful performance, by such person, of the duties of the office or trust, shall be sufficient, notwithstanding any special provision made by law for the condition of such bond.<sup>1</sup>

(1) **Condition in municipal officer's bond.**—(re-enacted in § 224 of the Code) See § 1738 R. S. and notes thereunder, p. 504.

**Sec. 8 R. S.** [Officers to hold till their successors are qualified, unless otherwise provided.] Any person holding an office or public trust shall continue therein until his successor is elected or appointed and qualified, unless it is otherwise provided in the constitution or laws.<sup>1</sup>

(1) **Holding until successor qualifies.**—See § 116 of the Code (relating to term of members of council) and note 3 thereunder, p. 304.

Compare also Code §§ 129, 132, 133 and others, relating to terms of other municipal officers.

**What officers.**—Membership in council was held to be an office within the meaning of § 8 R. S., State

*ex rel.* v. Kearns, 47 O. S. 566, 568. See further as to what is an office, State v. Kennon, 7 O. S. 546; State v. Taylor, 12 O. S. 130; Walker v. Cincinnati, 21 O. S. 14; Warwick v. State, 25 O. S. 21; State v. Wilson, 29 O. S. 347.

An officer whose term is fixed and limited by the constitution holds only until the end of such term and cannot hold over until his successor

qualifies, as provided in § 8 R. S., State *ex rel.* v. Brewster, 44 O. S. 589.

An officer appointed to fill an unexpired term, holds until his successor is chosen and qualifies. State v. McGregor, 44 O. S. 628; State *ex rel.* v. Darby, 12 C. C. 235, 239 (aff'd 52 O. S. 611).

See also State *ex rel.* v. Thrall, 59 O. S. 368.

**Meaning of successor.**—Successor as used in § 8 was held to

mean a regular successor and not a mere temporary appointee. State v. Wright, 56 O. S. 540, 554.

The holding over continues where the time of qualifying and taking office by the successor has been extended by statute. State *ex rel.* v. Killits, 8 C. C. 30.

**Character of holding over.**—The holding over is a continuance of the original term of office. State v. Howe, 25 O. S. 588.

**Sec. 9 R. S. [Deputies and clerks; their terms, etc.]** A deputy or clerk, appointed in pursuance of law, shall hold the appointment only during the pleasure of the officer appointing him; <sup>1</sup> and the principal may take from his deputy or clerk a bond, with sureties, conditioned for the faithful performance of the duties of the appointment; but, in all cases the principal is answerable for the neglect or misconduct in office of his deputy or clerk.

(1) **No holding over.**—A deputy, since he must hold during the pleasure of the officer appointing him, cannot claim the office under a successor to the principal, though the deputy was appointed for a definite term which had not expired.

Brady v. French, 6 N. P. 122.

Whether a deputy clerk legally appointed during first term and holding over during second term, without reappointment, is a *de facto* officer, *quere.* State v. Townley, 67 O. S. 21, 27.

**Sec. 10 R. S. [Power of deputy.]** A deputy, when duly qualified, shall have power to perform all and singular the duties of his principal.<sup>1</sup>

(1) **Character of deputy.**—Compare § 4949 R. S.

Deputy is not a public officer within penal laws. State v. Meyers, 56 O. S. 340, 349.

See further note (2) to § 1737 R. S., re-enacted in § 224 of the Code, p. 502.

**Duties.**—As to duties that may

be performed by various deputies, such as deputy clerks of court, sheriffs, etc., see Chapin v. Allison, 15 O. 566; Walke v. Bank, 15 O. 288; Haines v. Lindsey, 4 O. 88; Anderson v. Brown, 9 O. 151; Hulse v. State, 35 O. S. 421; Warwick v. State, 25 O. S. 21.

**Sec. 11 R. S. [Term of appointee to elective office.]** When an elective office becomes vacant, and is filled by appointment, such appointee shall hold the office till his successor is elected and qualified, and such successor shall be elected at the first proper election that is held more than thirty days after the



occurrence of the vacancy; <sup>1</sup> but this section shall not be construed to postpone the time for such election beyond that at which it would have been held had no such vacancy occurred, nor to affect the official term, or the time for the commencement of the same, of any one elected to such office before the occurrence of such vacancy.

(1) **Municipal offices.**—As to manner of filling vacancies and terms of appointees, in municipal offices, see § 228 of the Code.

**Effect of special provisions.**—When there is a special statute providing for the manner of appointment to fill vacancies in particular offices and the terms of such appointees, such special statute must be regarded as an exception to the general provisions of § 11 R. S. *State ex rel. v. McGregor*, 44 O. S. 628; see also *Cincinnati v. Holmes*, 56 O. S. 104, 114.

**Vacancy.**—As to when a vacancy occurs see note (2) to § 228 of the Code.

**First proper election.**—The words “first proper election” were held to mean the first recurrence of the regular election for that particular office, under the law regu-

lating elections to that office. *State v. Barbee*, 45 O. S. 347; *State ex rel. v. Hadley*, 59 O. S. 167, 169; *State v. Slough*, 12 C. C. 105; *Harte v. Bode*, 4 N. P. 421; *State ex rel. v. Nash*, 66 O. S. 612, 620.

**Appointment to fill vacancy.**—Officer cannot generally make appointment to begin after expiration of term of officer appointing; but where statute requires appointment at a particular time, it may be made at that time without regard to the time when service begins. *State ex rel. v. Ermston*, 14 C. C. 614.

Appointment for less or more than the legal time will not abridge or extend the term of the appointee as fixed by the statute. *State ex rel. v. Darby*, 12 C. C. 235 (aff'd 52 O. S. 611); *State ex rel. v. Slough*, 12 C. C. 105.

**Sec. 16 R. S. [Official seals.]** \* \* \* The seals of all other state, county, and municipal officers <sup>1</sup> shall be one inch and three-fourths in diameter, and shall be surrounded by the proper name of the office. \* \* \* [1886, April 1: 83 v. 60.]

(1) **Corporate seal** of municipality. See note (3) to § 7 of the Code, page 43.

**Seal of city auditor.**—See § 134 of the Code.

**Seal of village clerk.**—See § 201 of the Code.

**Sec. 17 R. S. [Debts not to be contracted by public officers without authority.]** An officer or agent of the state or of any county, township, or municipal corporation, <sup>1</sup> who is charged or intrusted with the construction, improvement, or keeping in repair of any building or work of any kind, or with the management or providing for any public institution, shall not make any contract binding or purporting to bind the state, or such

county, township, or municipal corporation, to pay any sum of money not previously appropriated for the purpose for which such contract is made, and remaining unexpended and applicable to such purpose, unless such officer or agent has been authorized to make such contract; and if any such officer or agent make or participate in making a contract without such appropriation or authority, he shall be personally liable thereon, and the state, county, township, or municipal corporation in whose name or behalf the same was made, shall not be liable thereon. [54 v. 77, §§ 1, 2; (S. & C. 889).]

(1) **Restrictions as to municipal contracts.**— See § 45 of the Code and notes thereunder, pp. 172 to 177 inclusive.

**Sec. 19 R. S.** [An office is vacant if the person elected or appointed thereto does not qualify.] Any person elected or appointed to an office of whom bond or security is by law required previous to the performance of the duties imposed on him by his office, who refuses or neglects to give such bond or find such security, agreeably to, and within the time for that purpose prescribed by law, and in all respects to qualify himself for the performance of such duties, shall be deemed to have refused to accept the office to which he was elected or appointed, and the same shall be considered vacant, and be filled as provided by law.<sup>1</sup> [29 v. 407, § 4; (S. & C. 888).]

(1) **Failure to qualify.**— Compare § 1740 R. S. (re-enacted in § 224 of the Code) and see notes thereunder, p. 507.

**Acceptance delayed.**— Where bond is given within time required by law but is not accepted till after the term begins, the acceptance will relate back and the bond will be sufficient. *State v. Tool*, 4 O. S. 553.

**Effect of failure to give bond.**

— Under § 19 R. S. and a section requiring proper authorities to “declare office vacant” on failure to give bond, if one elected to office fails, without justification, to give bond, a vacancy is created beginning on the day the bond should have been given. *State ex rel. v. Commissioners*, 61 O. S. 506.

§ 19 cited, *Reiter v. State*, 51 O. S. 74.

**Sec. 20 R. S.** [Gifts, devises, and bequests may be made to public authorities.] The state, county commissioners, township trustees, cemetery trustees, the councils, boards or officers of municipal corporations, and the boards of directors, trustees or other officers of any of the benevolent, educational, penal or reformatory institutions, wholly or in part under the control of the state, or any of said municipalities or institutions shall be

capable of receiving by gift, devise or bequest, moneys, lands or other properties, for their benefit or the benefit of any of those under their charge, and to hold and apply the same according to the terms and conditions of the gift, devise or bequest;<sup>1</sup> but this section shall not be held to affect or change the statutory provisions as to devises or bequests for such purposes. [1881, April 8: 78 v. 109; Rev. Stat. 1880; 66 v. 8, § 1; 74 v. 38, § 20; 75 v. 42, § 1.]

(1) **Power to receive.**—See § 7 of the Code, page 43; and paragraph 26 of §7, page 61.

**Character of devises.**—For cases sustaining devises to public authorities, see *Scott v. Trustees*, 39 O. S. 153; *Christy v. Commissioners*, 41 O. S. 711; *Chapin v. School District*. 3 Dec. (Re) 321. See further *Urney v. Wooden*, 1 O. S. 160.

**Investment of funds** received, see *Scott v. Trustees*, *supra*.

**Void devises.**—§ 20 R. S. must be construed in connection with § 5915 R. S., (making bequests for charitable purposes void, if made within one year of death, etc.), and bequests in violation of § 5915 will be absolutely void, and the public authorities will not have power to receive the same. *Folsom v. Haas*, 9 C. C. 473.

**Sec. 21 R. S. [Concerning illegal loans or deposits by public officers.]** The state, any county, township, municipal corporation, or school board, shall not be precluded by the illegal loan or deposit by any officer or agent of public money, funds, property, bonds, securities, or assets, belonging to it, from suing for and recovering the same;<sup>1</sup> and such suit shall not be held to be an adoption or satisfaction of such illegal transaction.<sup>2</sup> [60 v. 64, § 1 (S. & S. 920).]

(1) **Application of section.**—Where a municipality has purchased property for the purpose of donating the same to a manufacturing corporation, which purpose is without authority of law, and has conveyed the same, it cannot claim to recover back the property and hold it under the provisions of § 21 R. S.

for the original purchase was invalid. *Markley v. Village of Mineral City*, 58 O. S. 430.

**Former rule.**—In *State v. Butties*, 3 O. S. 309, it was held the state could not sue to recover an unauthorized loan without ratifying the loan.

**Sec. 1049 R. S. [Duty of public officers with respect to county auditor's report as to number of horses, cattle, etc., and local indebtedness.]** The auditor shall, on or before the first day of July, annually, make out and transmit to the auditor of state, an abstract of the number of horses, neat cattle, sheen, hogs, mules, and asses in his county, as the same are returned



to his office by the assessors; and he shall also, on or before the first day of October, annually, transmit to the state auditor, a complete abstract of the funded and unfunded indebtedness of his county, and of each township, city, village, hamlet, and of every school district therein, as the same may be on the first day of September preceding, with the rate of interest payable thereon, the date of maturity, and the purpose for which the same has been created; and, also, what provision of money has been made for the payment of any such indebtedness, what amount has been collected, and whether remaining in the county, township, city, village, hamlet, or school district treasury; and to enable the county auditor to make this statement, the various officers of all townships, cities, villages, hamlets, and school districts are required to furnish him with information in that behalf, at such time and in such manner as he requires; and he shall furnish them blanks for that purpose. [66 v. 26, §2; 70 v. 251, §§ 1, 2, 3.]

**Sec. 6969 R. S. [Officer or agent of state who is interested in contracts for use of state.]** It shall be unlawful for any person holding any office of trust or profit in this state, either by election or appointment, or any agent, servant or employe of such officer, or of a board of such officers to become directly or indirectly interested in any contract for the purchase of any property, supplies or fire insurance for the use of the county, township, city, village, hamlet, board of education or public institution with which he is connected. And it shall be unlawful for any such person, agent, clerk, servant or employe to become interested in any contract for the purchase of property, supplies or fire insurance for the use of any county, township, city, village, hamlet, board of education or public institution with which he is [not] connected when the amount of such contract exceeds the sum of fifty dollars, unless the contract is let on competitive bids, duly advertised as provided by law. Any person violating the provisions of this act shall be imprisoned in the penitentiary not more than ten years nor less than one year.<sup>1</sup> [94 v. 391; R. S. of 1880; 73 v. 86, § 21; 73 v. 31, § 22; 73 v. 43, § 34.]

(1) **Officer interested in contract.**—See § 45 and see note (3) thereunder, p. 176.

**Sec. 6976 R. S. [Municipal officer or township trustee financially interested in public work.]** An officer or member of the council of any municipal corporation or the trustee of any town-

ship who is interested directly or indirectly in the profits of any contract, job, work or services for the corporation or township, or acts as commissioner, architect, superintendent or engineer in any work undertaken or prosecuted by the corporation or township during the term for which he was elected or appointed, or for one year thereafter, shall be fined not more than one thousand dollars nor less than fifty dollars, or imprisoned not more than six months nor less than thirty days, or both, and shall forfeit his office.<sup>1</sup> [94 v. 406; 90 v. 29; 66 v. 164, § 92.]

(1) See note under § 6969 R. S. page 538.

**Sec. 3641c. [Sufficiency of bonds, etc., executed or guaranteed by companies.]** In all cases in which any bond, recognizance or undertaking is now or hereafter may be required or permitted by law, or ordinance, or the head of any department of this state, or any division of government of [or] municipality thereof, with one or more sureties, the execution of the same or the guaranteeing thereof, as the case may be, as surety, shall be sufficient by a company or companies authorized by the laws of this state to guarantee the fidelity of persons holding places of public or private trust, to guarantee the performance of contracts other than insurance policies, and to execute and guarantee bonds and undertakings in actions or proceedings or by law allowed;

**[All official or fiduciaries' bonds must be guaranteed by surety company; exception.]** and the execution or guaranteeing, as surety, of all bonds and undertakings for the faithful performance of official or fiduciary duties, or the faithful keeping, applying or accounting for funds or property, or for one or more of such purposes, excepting bonds of the superintendent of insurance and of notaries public, or of executors, administrators, guardians, trustees or other fiduciaries, whose bonds are fixed by the court at an amount not in excess of two thousand dollars is hereby required to be by such company or companies. But no such company shall qualify as surety upon any one bond or undertaking, herein required to be a corporate surety bond or undertaking, for more than twenty per cent. of its paid up capital. And any such bond, recognizance or undertaking when so executed and guaranteed, shall be in all respects, a full and complete compliance with every requirement of law, ordinance, rule or regulation that such bond, undertaking or recognizance shall be executed and guaranteed by one

surety or two or more sureties, or that such sureties shall be residents or householders or freeholders;

**[Allowance for premium paid company.]** and any judge, court or officer, whose duty it is to pass upon the account of any assignee, trustee, receiver, guardian, executor, administrator or other fiduciary, required by law to give bond or undertaking as such, and whenever any such assignee, receiver, trustee, guardian, executor, administrator or other fiduciary, has given bond or undertaking with a surety company or companies as surety or sureties thereon, as herein provided, shall allow, in the settlement of the account of such assignee, receiver, trustee, guardian, executor, administrator or other fiduciary a reasonable premium, subject to the limitations hereinafter provided, paid to any such company or companies for becoming his surety on such bond or undertaking;

**[How premium paid. Amount of premium.]** in all other cases, where by the foregoing provisions of this act a corporate surety or guarantor is required, the premium to be paid to any such company or companies for becoming such surety or guarantor shall be paid out of the general funds of the divisions of government by or for which the person giving such bond or undertaking was appointed or elected; provided, however, that the premium shall in no case exceed in the aggregate one-half of one per cent. per annum on the amount of such bond or undertaking, unless such bond or undertaking shall be in double the amount of the liability of the party principal therein, when such premium shall not exceed in the aggregate one-fourth of one per cent. per annum on the amount of such bond or undertaking, provided, also that such company or companies have complied and continue to comply with the laws of this state relative to such companies, and with such requirements as to justification, as may be prescribed by the head of the department, court, judge, or officer required to approve or accept the same.

**[When personal security bond may be given.]** Provided, further, that if any person required to give any such bond or undertaking shall make affidavit that he has applied to any such company or companies, as the case may be, for such bond or undertaking, and that the same has been refused by such company or companies, or rejected, in accordance with the provisions hereof by the head of the department, court, judge, or officer required to approve or accept the same; upon filing such affidavit with such head of department, court, judge, or officer,



such person may give such bond or undertaking with such personal surety or sureties and such justification of sureties as would be required by law except for the passage of this act;

[**Surety company shall not require or receive collateral security.**]

provided, further, that no surety company or companies executing bonds for public officials shall require or receive collateral or other security from the public officials for whom such bond or bonds are executed. [97 v. 182; 92 v. 320; 90 v. 157; 88 v. 14.]

**Validity.**—The above section, as amended in 1904, and known as the Crafts Bond law, was held unconstitutional, in so far as it re-

quires surety companies as sureties on certain bonds. *State ex rel. v. Robins*, 71 O. S. 273; *Haunts v. Lanman Co.*, 15 Dec. 64.

## 2. PROVISIONS AS TO CERTAIN OFFICERS.

### COUNCIL.<sup>1</sup>

**Sec. 1689 R. S. [Voting precincts.]** Whenever the electors in any ward of any city exceed seven hundred and fifty, the council shall divide the ward into as many voting precincts as it may deem proper, and the combined vote of such precincts shall be returned as the vote of the ward, and whenever the electors in any village exceed seven hundred and fifty, the council may divide the village into as many voting precincts as it may deem proper, and the combined vote of such precincts shall be returned as the vote of the village; but this section shall not apply when provision is otherwise made by law. [1889, April 2: 86 v. 176, 177; 82 v. 15; Rev. Stat. 1880; 71 v. 135, § 10.]

(1) **Title, division and chapter.**—§§ 1689 and 1691 R. S. given here formed part of Chap. 2, Div. 3, Title XII R. S., relating to council and board of aldermen.

§ 1678 R. S., the only other section not repealed in that chapter, is re-enacted in § 197 of the Code.

**Sec. 1691 R. S. [Council restricted as to contracts.]** The council shall not enter into any contract which is not to go into full operation during the term for which all the members of such council are elected.<sup>1</sup> [66 v. 261, § 660.]

(1) **Scope of restriction.**—See *Kerlin Bros. v. Toledo*, 20 C. C. 603, 621.

It was held that the contracts referred to in § 1691 R. S. are contracts "for services performed, and supplies furnished for the corpora-

tion." *Logan Nat. Gas Co. v. Chillicothe*, 65 O. S. 186, 207.

The restriction does not apply to contracts with gas companies for furnishing gas, that is, ordinances regulating the price of gas. *Ib.*

See further, on scope of restriction, *Jonas v. City*, 18 O. 318.

ASSESSORS.<sup>1</sup>

**Sec. 1718 R. S. [Election of assessors.]** In municipal corporations divided into wards, an assessor shall be elected in each ward at every annual election. He shall take the same oath, give the same bond and perform the same duties as are provided with respect to township assessors. Provided, that in any township, composed in part of a municipal corporation or municipal corporations, the county commissioners may, by order entered on their journal, constitute the territory outside such municipal corporation or corporations one or more assessor districts, in each of which an assessor shall be elected, annually, in accordance with law. Provided, also, that nothing herein shall interfere with the duties now devolving upon deputy state supervisors of elections. [91 v. 76; 56 v. 156, § 1; 76 v. 55; (S. & S. 85).]

(1) **Title, division and chapter.** —Sections under this heading were contained in Chap. 2, Div. 4, Title XII R. S. All sections of this chapter are repealed by the Code, except those given here, and §1721 R. S. given *infra*.

**Sec. 1718a R. S. [Assessors in certain cities shall appoint assistants; bond and oath.]** In cities of the third grade of the first class each ward assessor shall, with the approval of the auditor of the county in which said city is situated, appoint some well-qualified citizen of such city to act as assistant who shall serve at a compensation of two dollars per day for each day or part of a day actually employed, and each assistant so appointed shall within the ward assigned, [whom] under the direction of the assessor appointing him, after giving a bond in the sum of two hundred dollars and taking an oath as prescribed by law, performing [perform] all the duties enjoined upon, vested in or required of assessors, and shall be subject to all provisions of law relating to assessors. [1883, April 18: 80 v. 182.]

**Sec. 1718b (1) R. S. [Assessors and assistants in Cleveland.]** In every city of the second grade of the first class, not exceeding forty-two assessors, and such number of assistants as the auditor shall deem necessary, shall be appointed by the county auditor, not more than one-half of whom shall be from the same political party, and such appointments shall be subject to confirmation by the tax commission, and each assessor, and assistant, shall receive for services a compensation of four dollars per day for each day actually employed in the performance of his duties, to be paid out of the county treasury. Every assessor so ap-

pointed shall, in addition to the general duties hereinafter prescribed, perform the same duties as are provided with respect to township assessors, and before entering upon his office shall take an oath and give bond in the sum of one thousand dollars, payable to the state, with two or more freehold sureties, approved by said tax commission, conditioned for the faithful and impartial performance of all his duties so prescribed, which bond, with his oath of office indorsed thereon, shall be filed and preserved by the county auditor in his office. No person shall be appointed or shall hold the office of assessor under the provisions of this section, who holds or is elected to any national, state, county, municipal or township office, or who is an employee of any national, state, county, municipal or township officer. [87 v. 138; 88 v. 341; repealed 89 v. 286; re-enacted 94 v. 378.]

**Sec. 1718b (2) R. S. [Assessors in Cincinnati.]** In cities of the first grade of the first class assessors shall not be elected, but the board of review shall, on the first Monday of April in each year, or as soon thereafter as said board of review shall be appointed and qualified, appoint an assessor for each ward, who shall be a resident elector therein, and who shall take the same oath, give the same bond and perform the same duties as are provided with respect to township assessors, and in all cases where an assistant to such assessor shall be necessary, said board of review shall also appoint such assistant, who shall have the same qualifications as such assessor. In making all appointments of assessors said board shall be governed solely by considerations of fitness for the duties of the office, and shall entirely disregard political opinions and party affiliations. [88 v. 225.]

**Sec. 1718c R. S. [Assessors in Springfield and Portsmouth.]** In cities of the second class, third grade *a*, and third grade *c*, there shall be appointed by the board of tax commissioners, in April of each year, an assessor for each ward, who shall be an elector thereof, and shall take the same oath, and give the same bond, receive the same compensation, and perform the same duties as are provided in respect to township assessors. [93 v. 614; 89 v. 18; 88 v. 160.]

#### COUNTY TREASURER HAVING CHARGE OF CITY AND SCHOOL FUNDS.

**Sec. 1721 R. S. [Oath, bond, etc., of county treasurer; examination of funds.]** In all cases where the treasurer of a county becomes treasurer of the city and school funds by virtue of other provisions of this title,<sup>1</sup> he shall qualify in every respect as if he were elected to the office, by taking the official oath



and giving separate bonds acceptable severally to the city council and school board of such city; said bond as city treasurer shall be made a part of the record of the proceedings of the city council when accepted and approved, and shall be carefully preserved by the city clerk, and the bond as treasurer of school funds shall be made a part of the record of the proceedings of the board of education, when accepted and approved, and shall be carefully preserved by the clerk of said board; and in all examinations of the county funds by the auditor and county commissioners, as provided by law, there shall, at the same time and in the same manner, be an examination of the city and school funds by at least one person for each fund, who shall be appointed by the county commissioners; and in examinations of the county treasury, by order of the probate judge, the accountants appointed by the judge shall count, examine and certify as to the condition of the city and school funds at the same time, and in the same manners as required by law in regard to the county funds. [88 v. 85; 70 v. 66, § 1.]

(1) This refers to Title XII. R. S.

#### MAYOR.<sup>1</sup>

**Sec. 1744 R. S. [Jurisdiction, powers, etc., of mayor.]** The mayor shall be a conservator of the peace throughout the corporation, and within the limits of the same shall have all the jurisdiction and powers of a justice of the peace in all civil cases, and his proceedings therein may be reviewed in the same manner, and he shall have jurisdiction in criminal cases as hereinafter provided.<sup>2</sup> [66 v. 169, § 114; (S. & C. 1510, 1511).]

(1) **Title, division and chapter.**  
—The sections included under this heading and under the headings "Clerk" and "Street Commissioner," form part of Chap. 5, Div. 4, Title XII. R. S. Under the headings "Solicitor," "Treasurer," "Auditor" and "Sealer of Weights and Measures" are included, besides the unrepealed sections of Chap. 5, not re-enacted, (except sec. 1122a, repealed in 1904), some sections relating to those offices, found in other parts of the Revised Statutes.

Other sections in Chap. 5, relating to these offices, and not repealed, are re-enacted in the Code.

For re-enacted sections relating to the mayor, see §§ 129 and 200 of the Code.

(2) **Concurrent jurisdiction.** — Under § 1744 R. S. the jurisdiction of the mayor in bastardy cases is concurrent with that of a justice of the peace. *Miller v. Oehler*, 36 O. S. 624.

§ 1831 R. S. confers on police justices the same power to hear and de-

termine cases that the mayor has. *Morgan v. Tighe*, 12 C. C. 719.

**Jurisdiction in damage cases.**

—Mayor has jurisdiction in a suit for damages against a railroad company. *R. R. Co. v. Seahill*, 33 B. 250.

**Validity.**—Act conferring jurisdiction and powers of a justice of the peace, on mayors, is constitu-

tional. *Steamboat Indiana v. Milliken*, 7 O. S. 383.

**Powers.**—Mayor is not authorized to accept money in lieu of bail. *Columbus v. Dunnick*, 41 O. S. 602.

In prosecutions for violation of ordinances, it is not error to refuse a change of venue. *Volk v. Westerville*, 3 N. P. (N. S.) 241.

**Sec. 1745 R. S. [Duties, fees, office, etc.]** He shall keep a docket, and shall be entitled to receive the same fees that are or may be allowed justices of the peace for similar services,<sup>1</sup> and he shall keep an office at some convenient place in the corporation, to be provided by the council, and shall be furnished by the council with the corporate seal of the corporation,<sup>2</sup> in the center of which shall be the words, "Mayor of the city of \_\_\_\_\_," or, "Mayor of the village of \_\_\_\_\_," as the case may be.<sup>3</sup> [66 v. 169, § 115.]

(1) **When fees not allowed.**—Where salary of mayor is fixed and it is further provided that he shall not be allowed fees for any services performed, except those provided by law, the fees received are for the benefit of the municipality. *Hatch v. Cincinnati*, 17 O. S. 48.

An officer whose fees are regulated by statute can charge fees for those services only to which compensation is by law fixed. *Debolt v. Trustees*, 7 O. S. 237.

Fees in state cases need not be turned into city treasury, notwith-

standing § 126 of the Code. See § 126 and note 4 thereunder, p. 326.

(2) **Execution of corporation deed.**—To the mayor is confided the corporate seal and he is the chief administrative and executive officer and it would seem is the proper person to sign deed by corporation. *Tiffin v. Shawhan*, 43 O. S. 178, 186.

Whether council can authorize clerk to execute a deed for city is a question. *Ib.*

(3) See § 7 of the Code, p. 43 and note (3) thereunder.

**Sec. 1752 R. S. [Appeal and error.]** Appeals may be taken from the decision of the mayor in civil cases, in the same manner as from justices of the peace: provided, that when a city or village extends into two or more counties, the appeal shall be taken to the court of common pleas of the county in which one or more of the defendants reside: a conviction under an ordinance of any municipal corporation may be reviewed by petition in error, in the same manner and to the same extent as was heretofore permitted on writs of error and *certiorari*, and the judgment of affirmance or reversal may be reviewed in the same manner; and for this purpose a bill of exceptions may be taken,<sup>1</sup> or a statement of facts embodied in the record on the application of any party; but no such petition shall be filed except on leave of the court or a judgment thereof,<sup>2</sup> and such court or

judge has power to suspend the sentence, as in criminal cases.<sup>3</sup> [66 v. 170, § 125; 72 v. 42, § 1.]

(1) **Allowing bill of exceptions.**—Mayor has no authority to extend the time for preparing a bill of exceptions in the prosecution for a violation of an ordinance. Nor is there any statute making the provisions of the civil practice before a justice of the peace applicable to criminal prosecutions before the mayor. *Village of Bradner v. Grundetisch*, 15 C. C. 32. But see *Germantown v. Basore*, 22 C. C. 417, 421.

**Review on weight of evidence.**—Former statutes provided that conviction in police court might be examined into by upper court on writ of error and reviewed on weight of evidence. The present section merely changes the remedy and allows a bill of exceptions, but does not interfere with review on weight of evidence. *Slaughter v. Columbus*,

61 O. S. 53; *Germantown v. Basore*, 22 C. C. 417. For holding under former law, see *Van Buskirk v. Newark*, 26 O. S. 37.

This section only applies where judgment is for violation of a municipal ordinance. *Fike v. State*, 4 C. C. (N. S.) 81, 25 C. C. 554.

(2) **Leave to file petition in error.**—Conviction in mayor's court for breach of ordinance may be reviewed by Court of Common Pleas, but leave to file a petition in error is a condition precedent. *Miller v. Bellefontaine*, 2 C. C. 139.

And refusal of Common Pleas Court to allow a petition in error to be filed is not reviewable in the Circuit Court. *Canfield v. Brobst*, 71 O. S. 42.

(3) **Power to suspend sentence.**—A mayor cannot suspend sentence and take bond unless an order to do so is made by Court of Common Pleas. *Scio v. Hollis*, 7 N. P. 281, 282.

### CLERK.<sup>1</sup>

**Sec. 1760 R. S.** [Clerk of court shall record, etc.] The clerk of the court of common pleas shall record the certificates mentioned in the last section,<sup>2</sup> in the book in which the record of the election and qualification of justices of the peace are kept; and the same fees shall be allowed to the officers certifying and recording the same as are allowed for certifying and recording the election and qualification of justices of the peace. [66 v. 171, § 133; (S. & C. 1536).]

(1) **Title, division and chapter.** See note (1) under § 1744 R. S. *supra*. For re-enacted sections relating to the clerk, see §§ 134 and 201 of the Code.

(2) The section referred to (§

1759 R. S.), is re-enacted in §§ 134 and 201 of the Code. It relates to the duty of the clerk to certify to the court the election of certain officers.

### TREASURER.<sup>1</sup>

**Sec. 1771 R. S.** [Duty of county treasurer.] The county treasurer shall, on the first Monday of February and August in each year, pay over to the treasurer of the corporation all moneys



received by him up to that date arising from taxes levied and assessments made belonging to the corporation.<sup>2</sup> [66 v. 175, § 155.]

(1) **Title, division and chapter.**  
—See note (1) under § 1744 R. S., p. 542. For re-enacted sections relating to municipal treasurer, see § 135 of the Code.

—County treasurer must pay over to treasurer of municipality all moneys arising from taxes and assessments belonging to the corporation, although paid under protest. *Ratterman v. State*, 44 O. S. 641.

(2) **Money paid under protest.**

**Sec. 1773 R. S. [Duty of outgoing treasurer as to delivering money, etc., to successor.]** The corporation treasurer, and the county treasurer, when acting as such, shall each, at the expiration of his term of office, or on his resignation or removal, deliver to his successor, all moneys, books, papers and other property in his possession as treasurer; and in the case of the death or incapacity of such treasurer, his legal representatives shall, in like manner, pay over and deliver the money and property which was so in the treasurer's hands, to the person entitled thereto. [55 v. 92, § 22; S. & C. 1602.]

**Sec. 1047 R. S. [How the county auditor shall keep accounts with townships, cities, villages, hamlets, and special school districts.]** The auditor shall open an account with each township, city, village, hamlet, and special school district in his county, in which, immediately after his semi-annual settlement with the treasurer, in February and August of each year, he shall credit each with the net amount so collected for its use; and on application of any township, city, village, hamlet, or school treasurer, the auditor shall give him a warrant on the county treasurer, for the amount then due to such treasurer, and shall charge him with the amount of such warrant; but the person so applying for such warrant, shall deposit with the auditor a certificate from the clerk of the township, city, village, hamlet, or district, stating that such person is treasurer thereof, was duly elected or appointed, and that he has given bond according to law.<sup>1</sup> [56 v. 128, § 22; S. & C. 100.]

(1) **Mandamus to compel treasurer to pay over money,** may be allowed, where treasurer refuses, upon presentation of the prop-

er orders. *Cass Tp. v. Dillon*, 16 O. S. 38.

Section cited, *Brown v. Van Wert*, 4 C. C. 407, 422.

**Sec. 1122 R. S. [County treasurer's payments to local treasurers.]** The county treasurer shall, immediately after each semi-

annual settlement with the auditor of his county, on demand, and presentation of the warrant of the county auditor therefor, pay over to the township treasurer, city treasurer, or other proper officer, all moneys in the county treasury belonging to any township, city, village, hamlet, or school district; but if any township treasurer or other proper officer aforesaid, requires, or the trustees of any township, the council of any city, village, hamlet, or the board of education of any school district, respectively, so direct, the moneys mentioned in this section shall remain in the county treasury, to be thence drawn by the proper local treasurer on the warrant of the county auditor, in sums of not less than one hundred dollars. And if any county treasurer shall retain, or if any township treasurer, or other local treasurer shall permit to remain in the county treasury, the moneys mentioned in this section, in any other manner than herein provided, the party so offending shall forfeit and pay for every such offense a sum not exceeding one thousand dollars, nor less than one hundred dollars, to be recovered in an action at the suit of the state, for the use of the county.<sup>1</sup> [1889, March 28: 86 v. 168; Rev. Stat. 1880; 56 v. 101, § 12; (S. & C. 1478).]

(1) See § 1771 R. S., p. 544.

**Sec. 1123 R. S.** [Advance payments may be made to local authorities.] Whenever the local authorities so request, the county auditor may draw, and the county treasurer shall pay on such draft to township, city and village treasurers, and the treasurer of any board of education, from June twentieth and December twentieth to the date of the semi-annual distribution, each year, any sum not exceeding two-thirds of the current collection of taxes for such local authorities, respectively, in advance of the semi-annual settlements. [1904, April 25, 97 v. 378; 86 v. 43; 70 v. 184.]

**[An act to provide for the release and discharge of county, city, village, township and school district treasurers and their sureties in certain cases.]**

**[Sec. 1.]** [Provisions for release and discharge of county, city, village, township or school district treasurers and their sureties in certain cases.] When without fault or negligence of the officer entrusted by law with the care of the same, a loss of public funds entrusted to a county, city, village, township or school treasurer, by virtue of his office, is caused by fire, robbery, burglary or inability on the part of the bank to refund

public money lawfully in its possession belonging to such public funds; the county commissioners, in case of such loss by a county treasurer, and the city or village council, township trustees and boards of education, in like cases of loss by city, village, township and school treasurers, respectively, are hereby authorized and empowered, to release and discharge such treasurer and the sureties upon his official bond from all liability to or demands of the county, city, village, township or school district interested, for such loss so created and arising; provided that before such release and discharge shall be affected such board of county commissioners, city or village council, township trustees or board of education, effecting such release and discharge, shall find; that such loss of public funds was not occasioned by the fault or negligence of such treasurer, and shall cause an entry of such finding to be made upon the record book of the proceedings of the council or board; provided further that in case of loss by county treasurers, the county commissioners, and in cases of loss by city or village treasurers, the city or village council, and in cases of loss by township treasurers, the township trustees, and in cases of loss by school treasurers, the board of education of the school district; having first made and caused to be entered the finding of no fault or negligence as above provided, may and they are hereby authorized, at the next ensuing general election to be held in such county, city, village, township or school district, respectively, to submit to the qualified electors of said county, city, village, township or school district interested the question of discharging such treasurer and the sureties upon his official bond from liability on account of such loss of funds.

Provided further that whenever twenty-five per cent. of the qualified electors of such county, in cases of county treasurers, or a like percentage of qualified electors in cases of city, village, township or school treasurers, shall petition the council or board for the privilege to determine by ballot whether any treasurer and the sureties on his official bond shall be released and discharged, such council or board shall, and they are hereby required to submit such question to the qualified electors of said county, city, village, township or school district interested, as herein provided. Provided that any taxpayer of the county, township, municipality or school district affected may within five days after any finding of release or discharge provided for in this act is made, take an appeal therefrom to the common pleas court of the county, and until such appeal is finally determined such finding and other proceedings shall not affect such release and discharge. Notice in writing of such intention to appeal shall be filed with the clerk or auditor of the board or council making such finding within five days thereafter, and a transcript of the said find-



ing and other proceedings shall within thirty days after said finding be filed in said common pleas court and docketed therein as other cases. Whereupon the court shall proceed to try and determine the question whether such public funds were lost by the fault or negligence of such treasurer; and in case it be found that they were, the finding of the board or council below ordering such discharge shall be vacated; but in case they were not, then such finding shall remain in full force, and the court shall cause its judgment to be certified to the board or council making such finding. [1906, April 11, 98 v. 122.]

[**Sec. 2.**] [**How question of release submitted to vote; notice, etc.**] The deputy state supervisors of elections of the county interested or within which such city, village, township or school district is located, shall cause notice of the submission of said proposition to the electors; in case of relief of county or city treasurers by publication in two newspapers of opposite politics in said county or city for at least thirty (30) days next prior to the date upon which such election is to be held, and in case of relief of village or township treasurers twenty (20) days' notice of such election shall be given by posting notices thereof in five (5) public places within the village or township; and in cases for the relief of school treasurers, ten (10) days' notice of such election shall be given by posting notices thereof in five (5) public places in the school district interested. [1906, April 11, 98 v. 122.]

[**Sec. 3.**] [**Ballots, how printed.**] The ballots for said election shall have printed thereon, "Discharge of treasurer and sureties—yes." "Discharge of treasurer and sureties—no." And shall have a place at the left of each proposition for the voter to mark according to law, the proposition he favors. [1906, April 11, 98 v. 122.]

[**Sec. 4.**] [**Entry of result of election.**] If a majority of the votes cast upon such proposition at such election shall be in favor of the discharge of the said treasurer and his said sureties, the board of county commissioners in cases of county treasurers, and the city or village council in cases of village treasurers, and the township trustees in cases of township treasurers, and boards of education in cases of school district treasurers, shall cause to be made an entry of the result of the election in the record book of proceedings of the council or board ordering such election and shall thereupon release and discharge said treasurer and his sureties on his official bond from all liability on account of such loss. But if a majority of the votes cast shall be against such discharge then entry of such result of such election shall be made in the record book of proceedings of the council or board ordering such election and no further action therein shall be taken by such council or board. [1906, April 11, 98 v. 122.]

AUDITOR.<sup>1</sup>

An act authorizing and directing the city auditors and accounting officers of municipal corporations to credit to the general fund all cash balances remaining in any fund which can no longer be used for the purpose for which it was created.

[Sec. 1.] [Transfer to general fund of cash balances remaining in any fund which can no longer be used for the purpose for which created.] That whenever any municipal corporation in this state has been authorized by any special or general act to issue bonds or otherwise to create a fund for any public improvement, and the authority so conferred has been exercised or exhausted by said municipal corporation, or the act authorizing the creation of such fund has been declared invalid by the judgment of any court of competent jurisdiction, and there remains a cash balance in said fund unexpended, for the purpose for which it was created, the auditor or other accounting officer of said municipal corporation is directed and authorized to immediately transfer such cash balance to the credit of the general fund of such corporation.

[Sec. 2.] [Same.] That whenever in any municipal corporation there exists at the end of the year, to-wit, on the 31st day of December, a cash balance in any fund, other than a fund created for some public improvement, and for any reason the said cash balance can no longer be lawfully used for the purpose or purposes for which the fund was created, it shall be the duty of the auditor or other accounting officer of such municipal corporation to transfer said cash balance so remaining at the end of the year to the general fund of said corporation.

[Sec. 3.] [Effect of transfer.] When any of the moneys authorized in this act to be transferred to the general fund of any municipal corporation have been so transferred said moneys shall be available for the general purposes of the corporation, as other moneys in said general fund. [May 12, 1902: 95 v 596.]

(1) For re-enacted sections relating to auditor, see § 134 of the Code.

SOLICITOR.<sup>1</sup>

**Sec. 1774 R. S. [Duties of solicitor or corporation counsel as to suits.]** The solicitor or corporation counsel shall, whenever required so to do by resolution of the council, or of the council or board of administration in cities of the first grade of the first class, or of the council or board of control in cities of the second grade of the first class, prosecute or defend, as the case may be, for and in behalf of the corporation, all complaints, suits and controversies in which the corporation is a party, except cases before the police court where there is a prosecuting attorney for such court and such other suits, matters and controversies as he shall, by resolution or ordinance, be directed to prosecute; but shall not be required to prosecute any action before the mayor for the violation of any ordinance without first advising such action.<sup>2</sup> [90 v. 132; 85 v. 249; Rev. Stat. 1880; 66 v. 175, § 157.]

(1) **Title, division and chapter.**  
— See note (1) to § 1744 R. S., p. 542. For re-enacted sections relating to solicitor, see § 137 of the Code.

(2) **Duties of solicitor.**— The solicitor is a public officer elected by the people, and, when required to do so by resolution of council, he shall prosecute and defend for and in behalf of corporation, except in certain cases. *State ex rel. v. Boyce*, 43 O. S. 46, 52.

Not necessary that city solicitor sign petition. *Deatrick v. City of Defiance*, 1 C. C. 340, 342.

City solicitor is not attorney or counsel for police commissioners. *Yaple v. Commissioners*, 2 C. C. 406.

It is the duty of the solicitor to furnish vouchers in condemnation cases when required of him by city ordinance, and mandamus will lie on his failure to do so. *Ryan v. Hoffman*, 26 O. S. 109.

Whether solicitor can bring suit, not under power given by § 1777 R. S., without resolution of council instructing him to do so, see *State ex rel. v. Boyce*, 43 O. S. 46, 52; *Toledo v. Toledo Ry. & Light Co.*, 2 C. C. (N. S.) 97.

An entry endorsed by the city solicitor, but filed subsequent to his retirement from office, no notice thereof being given to his successor, is not in compliance with the rule of court providing that when an entry is approved by counsel it shall be so endorsed and presented to the court. *Wolcott v. Columbus*, 13 Dec. 561.

The word "person" as used in Section 5321 R. S., applies to municipal corporation. Hence, when a municipal corporation attempts to confess judgment under the provisions of Sections 5321 and 5322 R. S., it is necessary to the validity of such proceeding that the city's legal representative appear in open court and confess judgment on behalf of the city. *Id.*

The city solicitor, as legal adviser of the city, has, as such representative, the standing to ask a revocation of proceedings by which a judgment by default and on confession was obtained, notwithstanding that the city council itself has not applied to the court for such revocation. *Id.*



**Sec. 1775 R. S. [City solicitor shall give opinions; Cincinnati.]**

When any officer of the corporation entertains doubts concerning the law in any matter before him in his official capacity, and desires the opinion of the solicitor, he shall clearly state to the solicitor, in writing, the question upon which the opinion is desired, and thereupon it shall be the duty of the solicitor, within a reasonable time, to reply orally or in writing to every such inquiry; and the right here conferred upon officers shall extend to the council, and to each board provided for in this title: provided, however, that in cities of the first grade of the first class, the city solicitor shall, in his official capacity, also act as the legal adviser of, and attorney for the board of police commissioners.<sup>1</sup> [1888, April 13: 85 v. 225; Rev. Stat. 1880.]

(1) See *Yaple v. Commissioners, classes under new Code* under § 2 C. C. 406. See note "Grades and 1599 R. S., p. 31.

**Sec. 3977. [Prosecuting attorney or city solicitor to act as counsel of school boards.]** The prosecuting attorney shall be the legal adviser of all boards of education in the county in which he is serving, except in city school districts, he shall prosecute all actions against a member or officer of a board of education for malfeasance or misfeasance in office, he shall be the legal counsel of said boards or the officers thereof in all civil actions brought by or against them and shall conduct the same in his official capacity; provided, that when said civil action is between two or more boards of education in the same county said prosecuting attorney shall not be required to act for either of them. In city school districts the city solicitor shall be the legal adviser and attorney for the board of education and shall perform the same services for said board of education as is herein required of prosecuting attorneys for other boards of education. The duties herein prescribed shall devolve upon any official serving in a capacity similar to that of prosecuting attorney or city solicitor for the territory wherein a school district is situated, regardless of his official designation. No prosecuting attorney, city solicitor or other official acting in a similar capacity shall be a member of the board of education. No compensation in addition to such officers' regular salary shall be allowed for such services. [1904, April 25, 97 v. 355; 79 v. 26; 70 v. 195.]

STREET COMMISSIONER.<sup>1</sup>

**Sec. 1782 R. S.** [Duties of various officers, and their compensation.] In municipal corporations that have a street commissioner, fire engineer, civil engineer, or superintendent of markets, those officers shall severally perform the duties prescribed by this title, and such other duties not incompatible with the nature of their office, as the council may by ordinance require; and each shall receive such compensation for his services, by fees or salary, or both, as may be provided by ordinance. [66 v. 176, §§ 164, 165.]

(1) **Title, division and chapter.** For provisions relating to street commissioner, see § 203 of the Code.  
See note (1) to § 1744 R. S., p. 542.

SEALER OF WEIGHTS AND MEASURES.<sup>1</sup>

**Sec. 1783 R. S.** [Duty of sealer of weights and measures.] The city or village sealer shall, at least once in three years, compare the copies of the standards in his possession with those in the office of the county sealer.<sup>2</sup> [58 v. 78, § 10; S. & S. 925.]

(1) **Title, division and chapter.**  
See note (1) to § 1744 R. S., p. 542.  
For authority to regulate weighing and measuring, see paragraph 12, § 7 of the Code, page 52.

(2) **Power of council.**—Under the general laws relating to weights and measures a municipality would have power to appoint an inspector, or sealer of weights and measures, and to enforce, by fine, the use of weights and measures sealed by such inspector. *Huddleson v. Ruffin*, 6 O. S. 604.

But power to provide for weighing and measuring articles sold does not authorize an ordinance forbidding the delivery of an article sold outside the city, unless weighed by city weigher. *Heminger v. Cleveland*, 3 W. L. M. 46.

A city may by ordinance appoint a city weigher but cannot forbid others from following the business of a weigher. *Cincinnati v. Broadwell*, 3 Dec. (Re) 286.

**Sec. 1784 R. S.** [Comparison and sealing weights and measures.] The city or village sealer shall compare all weights and measures which are brought to him for that purpose, with the

copies in his possession, and when such weights and measures are made exactly to agree with said copies, he shall seal and mark such weights and measures. [58 v. 78, § 11; S. & S. 925.]

**Sec. 1061 R. S. \* \* \* \* \*** [Sealer of weights and measures in Toledo; appointment, etc.] Provided, however, that in cities of the third grade of the first class there shall be appointed by the mayor, and confirmed by the common council, one sealer of weights and measures, a competent person for the position, who shall receive a salary of fifteen hundred (\$1,500) dollars per annum, to be paid by the city, and which shall be in lieu of all fees or charges otherwise allowed by law. Such sealer shall hold his office for a term of two years and until his successor is appointed and qualified, and he shall be authorized to appoint a competent deputy, at his own expense, to assist him in the performance of his duties. Before entering on his duties, such sealer shall take the oath of office required by law, and give a bond to the city, conditioned for the faithful performance of his duties, with security, to the approval of the common council, in the sum of one thousand (\$1,000) dollars.

[State sealer to furnish copies of standards.] State sealer of weights and measures, as provided in section 145, Revised Statutes of Ohio, shall furnish, for the use of such sealer, all necessary and approved standard measures, and also all standard weights required, under fifty pounds, with necessary subdivisions.

[Sealer to furnish standard weights.] Such sealer shall furnish, at his own expense, not less than two thousand pounds of standard weights to be used in testing wagon and other large scales, and shall use not less than one thousand pounds in testing wagon scales, and not less than two thousand pounds in testing railroad track scales.

[Duty of sealer.] It shall be the duty of the sealer to faithfully devote his time to the performance of the duties of his office, and to test all weights, measures, scales, beams, steelyards, and other machinery used for weighing or measuring, within such city, at least once in every year; and, upon being notified, in writing, by any person that any weight, measure, scale, beam, steelyards, or other machinery for weighing or measuring any article intended to be purchased or sold in such city, is inaccurate, or believed to be so, or not according to the standard, to at once make an examination of the same;

[Sealer has police powers.] And in the exercise of such duties he shall have full police powers to enforce any and all rea-



sonable measures for testing such weights and measures, and also in ascertaining whether false or short weights and measures are being given in any sales or transfers of articles of merchandise taking place within such city;

[**Approval of weights or measures.**] And after he shall have found such weights and measures to be correct and according to the standard prescribed by law, he shall seal or mark the same with a stamp, or by pasting a card thereon, as he may deem most proper, with the letters "C. S.," the initials for "City Sealer," which said cards and seals shall be provided by the city.

[**Confiscation and destruction of unlawful weights and measures; use of weights, etc., not standard, prohibited.**] If such sealer shall find, upon examination of any weights or measures used by any person, that the same do not conform to the standard prescribed by law, he shall have authority to confiscate such weights or measures and destroy the same. No person shall use weights, measures, scales, beams, steelyards, or other machinery for weighing or measuring any article intended to be purchased or sold in such city, or any weight or measurement in which other persons or the public are interested, which do not conform to the standards prescribed by law.

[**False or short weight or measure.**] No person shall give or direct or permit any person in his employ to give any false or short weight or measure in the sale or transfer of any property in such city, whereby any person may be defrauded or injured.

[**Altering weight, measure, etc.**] No person shall alter or permit to be altered, or knowingly use or permit to be used, after the same shall have been altered, any weight, measure, scale, beam, steelyards, or other instrument for weighing or measuring, after the same shall have been tested, marked and sealed, which, by reason of such alteration, shall not conform to the legal standard.

[**Persons required to exhibit to sealer weights, etc., for examination, testing and marking.**] It shall be the duty of every person or persons, when called upon, to exhibit to such sealer all weights, measures, scales, beams, steelyards, or other machinery by them used or intended to be used for weighing or measuring any article or commodity, bought or sold, and permit said sealer to examine, test, and mark the same.

[**Penalty.**] Any person violating any of the provisions of this act, or any section thereof, shall, upon conviction thereof in any court having jurisdiction thereof, be fined not less than

five (\$5.00) dollars nor more than twenty-five (\$25.00) dollars for the first offense, or imprisoned not more than thirty days, or both; and, upon conviction for any subsequent offense, shall be fined not less than twenty-five (\$25.00) dollars nor more than one hundred (\$100.00) dollars, or imprisoned not more than sixty days, or both, and shall stand committed until such fine and costs are paid. [93 v. 201; 91 v. 302; 58 v. 78, § 17; S. & S. 925.]

**Sec. 145 R. S.** [State sealer to furnish copies of standards.] The state sealer shall furnish like copies of the original standards to the sealer of any city or village upon application therefor, and payment of the costs thereof, by such city or village.<sup>1</sup> [58 v. 78, § 9; S. & S. 924.]

(1) **Appointment of sealers or inspectors** of weights and measures by municipalities was held to be authorized by a section such as this; and incident to the creation of the office, the municipalities would have

power to prescribe duties of such officers. *Huddleson v. Ruffin*, 6 O. S. 604.

See paragraph 12 of § 7 of the Code, page 52.

## FIRE AND POLICE OFFICERS.

**Sec. 409—51 R. S.** [Duties of marshal in connection with other officers to investigate fires.] The state fire marshal and the chief of the fire department of every city or village in which a fire department is established, and the mayor of every incorporated village or town in which no fire department exists, and the township clerk of every organized township without the limits of any organized village or city, shall investigate the cause, origin and circumstances of every fire occurring in such city, village, town or township by which property has been destroyed or damaged, and shall especially make investigation as to whether such fire was the result of carelessness or design. Such investigation shall be begun within two days, not including the Sunday of the occurrence of such fire, and the fire marshal shall have the right to supervise and direct such investigation whenever he deems it expedient or necessary.

[**Notification of fire to marshal.**] The officer making investigation of fires occurring in cities, villages, towns or townships shall forthwith notify said fire marshal, and shall within one week of the occurrence of the fire, furnish to the said fire marshal a written statement of all the facts relating to the cause and origin of the fire, and such other information as may be called for by the blanks provided by the said fire marshal.  
\* \* \* [95 v. 472, 94 v. 387.]

**Sec. 409—54 R. S. [Right of marshal and other officers upon complaint to enter buildings for purpose of investigation.]** The state fire marshal, his deputies and assistants, the chief of fire department of all villages and cities where a fire department is established, and the mayor of cities or villages where no fire department exists, and the clerks of each township in the territory without the limits of an organized city or village, upon complaint of any person having an interest in any building or property adjacent, and without any complaint, shall have a right at all reasonable hours, for the purpose of examination, to enter into and upon all buildings and premises within their jurisdiction.

**[May order repair of building or removal of inflammable or explosive material.]** Whenever any of said officers shall find any building, or other structure, which, for want of proper repair, or by reason of age and dilapidated condition, or for any cause, is especially liable to fire, and which is so situated as to endanger other buildings or property, and whenever any of such officers shall find in any building, or upon any premises, combustible or explosive material, or inflammable conditions, dangerous to the safety of said buildings or premises, they shall order the same to be removed or remedied, and such order shall be forthwith complied with by the owner or occupant of said building or premises;

**[Right of aggrieved person to appeal to state fire marshal.]** provided, however, that if the said occupant or owner shall deem himself aggrieved by such order, he may, within twenty-four hours appeal to the state fire marshal, and the cause of the complaint shall be at once investigated by the direction of the latter, and unless by his authority the order is revoked, such order shall remain in force and be forthwith complied with by said owner or occupant.

**[Penalty for non-compliance.]** Any owner or occupant of buildings or premises failing to comply with the orders of the authorities, above specified, shall be punished by a fine of not less than ten dollars (\$10.00) nor more than fifty dollars (\$50.00) for each day's neglect. [95 v. 473; 93 v. 388.]

**Sec. 409—55. R. S. [Penalty for neglect of official duty.]** Any officer referred to in section 409—51 herein, who neglects to comply with any of (the) requirements of this act shall be punished by a fine of not less than twenty-five dollars, nor more than two hundred dollars. [95 v. 474; 93 v. 388.]

**Sec. 7129 R. S. [Who may arrest.]** A sheriff, deputy sheriff, constable, marshal or deputy marshal, watchman, or police officer, shall arrest and detain any person found violating any law of this state, or any legal ordinance of a city or village, until a legal warrant can be obtained. [66 v. 291, § 21.]

**Sec. 1315 R. S. [No witness fees to policeman in cases specified.]** No watchman or other police officer is entitled to witness fees in any cause prosecuted under any criminal law of the



state, or any ordinance of a city of the first or second class, before any police judge or mayor of any such city, justices of the peace, or other officer having jurisdiction in such causes. [56 v. 22, § 1; S. & C. 647.]

**Sec. 6858—1 R. S. [Disposition of stolen or other property recovered by police.]** All stolen or other property recovered by members of the police force shall be deposited and kept in a place designated by the mayor; every such article or property shall be entered in a book, kept for that purpose, together with the name of the owner, if ascertained, and the name of the place where found, and of the person from whom taken with general circumstances, and the date of its receipt and the name of the officer receiving the same; and an inventory of all money, or other property, shall be given to the party from whom the same was taken, and in case the same is not, within thirty days after such arrest and seizure, claimed by some person, it shall unless otherwise ordered by the board, be delivered to the person from whom the same was taken, and to no other person, either attorney, agent, factor, or clerk except by special order of the mayor; and in case such money or property is, within thirty days claimed by any other person it shall be retained by such custodian until after the discharge or conviction of the person from whom the same was taken and so long as it may be required as evidence in any case in court; and if such claimant establish, to the satisfaction of the police judge, that he is the rightful owner, the same shall be restored to him, otherwise, it shall be returned to the accused person, personally, and not to any attorney, agent, factor, or clerk of such accused person, except upon special order of the mayor after all liens and claims in favor of the city, against the same shall have been discharged and satisfied. [1906, March 17, 98 v. 60.]

**Sec. 6858—2 R. S. [Penalty against officer for neglecting or refusing to dispose of property as herein provided.]** In case of the neglect or refusal of any officer or patrolman to deposit the property taken or found on the possession of any person arrested, as provided in the preceding section, he shall be deemed guilty of a misdemeanor and subject to indictment, or information, and be fined in a sum not exceeding three thousand dollars, and in no case less than twice the value of the property, or be imprisoned in the county jail not exceeding one month or both; and the sentence of the court in all such cases shall operate to vacate the office of the person so convicted. [1906, March 17, 98 v. 60.]

**Sec. 6858—3 R. S. [Sale of unclaimed goods; disposal of proceeds.]** All goods unclaimed for the period of one year shall be sold by the superintendent of police at public auction, after giving due notice thereof, by advertisement published three times in a newspaper of general circulation in such county.

The proceeds realized from such sale at public auction shall

be paid over to the treasurer of the police relief fund to be placed to the credit of said fund, in all municipalities where there is such a fund and trustees and officers thereof; provided, however, that in municipalities where there is no police relief fund and trustees and officials thereof, said proceeds of said sales at public auction shall be turned over to the treasurer of such municipality, to be credited to the general fund of such municipality. [1906, March 17, 98 v. 60.]

### 3. ELECTION AND REMOVAL OF OFFICERS.<sup>1</sup>

**Sec. 1725 R. S. [Designation of election.]** The council of every municipal corporation shall designate the place or places for holding the regular elections; and in all corporations divided into wards, there shall be a place or places in each ward designated for holding elections. [67 v. 70, § 72.]

(1) Sections given here formed part of Chap. 3, Div. 4, Title XII R. S. No sections of this chapter are repealed by the Code, except § 1724 R. S. But § 1723 R. S., providing time of annual elections in municipalities and § 1736—1 R. S., providing for election in munic-

ipalities that have failed to elect officers, were repealed by the Hypes Election Law (97 v. 238).

**Code provisions** on election, appointment and removal of officers, see §§ 222, 223, 225, 226, 228, 230 of the Code in Part I.

**Sec. 1726 R. S. [Mayor's election proclamation.]** The mayor, previous to any election for a municipal officer or officers, shall issue a proclamation to the electors of the corporation, or of the respective wards or districts, as the case may require, setting forth the time and places of election, and the officers to be chosen, and cause such proclamation to be published in some newspaper printed in the corporation, at least ten days previous to the election, or, if no such newspaper is published in the corporation, such notice may be given by posters. [66 v. 161, § 73.]

#### FORM OF MAYOR'S ELECTION PROCLAMATION

##### Election Notice.

The qualified electors of the city [or village] of....., State of Ohio, are hereby notified that an election will be held at the usual voting places in said city [or village] on....., the ..... day of ....., 19....., between the hours of ..... A. M. and ..... P. M., at which election the following officers will be chosen: (here insert names of officers to be elected.)

Given under my hand and the corporate seal of the city [or village] of....., this ..... day of ....., 19.....

Mayor.

**Sec. 1727 R. S. [Who are electors.]** A person who, at the time of an election for municipal officers, is an elector for county officers, and resides in the ward, or corporation, if there be no wards, in which he offers to vote, is a qualified elector; and the elections shall be held and conducted in all respects, in the manner prescribed by law in case of township elections. [66 v. 162, § 74.]

**Sec. 1728 R. S. [Election returns; when opened.]** Returns of municipal elections in corporations which are divided into election districts or wards, shall be made to the clerk or auditor of the corporation, and be opened by him within the time prescribed for the opening of the returns of county elections. [1904, April 25, 97 v. 190; 66 v. 162, § 75.]

**Sec. 1729 R. S. [Abstracts of votes.]** The clerk or auditor, or in his absence or disability, some person to be selected by the council, shall call to his assistance the mayor, and in his presence, make an abstract and ascertain the candidates elected, as required by law with respect to county officers; and he shall, in like manner, make a certificate as to each candidate so elected, and cause the same to be delivered to him, or left at his usual place of abode; provided, that if there is no mayor, or the mayor is absent or disabled, or a candidate at such election, the clerk shall call to his assistance a justice of the peace of the county. [1904, April 25, 97 v. 190; 66 v. 162, § 76.]

#### FORM OF CERTIFICATE OF ELECTION.

I, ....., clerk of the village of .....,  
State of Ohio, do hereby certify that at the election held in said village  
on ....., 19...., ..... was duly elected  
..... of the said village of .....

Witness my hand and official seal, this .... day of....., 19....

.....  
Clerk of the village of.....

**Sec. 1731 R. S. [Tie vote; decision by lot.]** If the result can not be determined from the votes cast, for the reason that more than the number of persons to be elected have an equal number of votes for the same office, then the officers whose duty it is to ascertain the persons elected, shall determine by lot which of such persons shall be declared elected; and the election of any municipal officer, except a member of the council, may be contested<sup>1</sup> in the manner provided by law for contesting the election of justices of the peace, except in cities of the first grade of the first class, such election may be contested only in the manner provided for contesting the election of county officers. [67 v. 70, § 78.]

(1) **Contested election.**— As to ..... As to contesting mayor's election  
powers and duty of jury in contest- in village, see State *ex rel.* v. Simp-  
ed election case, see State *ex rel.* v. son, 5 B. 422.  
Wright, 56 O. S. 540.

**Sec. 1732 R. S. [Charge of malfeasance, etc., in office; citation by probate judge.]** On complaint, under oath, filed with the probate judge of the county in which the corporation, or the larger part thereof, is situated, by any elector of the corpora-



tion, signed and approved by four other electors thereof, charging that any member of the council or alderman has received, directly or indirectly, any compensation for his services as councilman, alderman, committeeman, or otherwise, contrary, to the provisions of section *sixteen hundred and eighty-three*<sup>1</sup> or that any alderman, member of the council, or any officer of the corporation, is or has been interested, directly or indirectly, in the profits of any contract, job, work, or services, or is or has been acting as commissioner, architect, superintendent, or engineer in any work undertaken or prosecuted by the corporation contrary to the provisions of section *sixty-nine hundred and seventy-six*,<sup>2</sup> or that any alderman, member of council, or any officer of the corporation has been guilty of misfeasance or malfeasance in office, such probate judge shall forthwith issue a citation to such party, charged in the complaint, for his appearance before him within ten days from the filing of such complaint, and also furnish the accused and city solicitor with a copy thereof: provided, that the probate judge shall require the party complaining to furnish sufficient security for costs before acting upon such complaint.<sup>3</sup> [68 v. 113, § 1.]

(1) Section 1683 R. S. is repealed by the Code. See §§ 126 and 194 of the Code.

(2) See this section *supra*, p. 538.

(3) **Removals.**—See §§ 118, 121, 129, 145, 225 and 226 of the Code. See notes to §§ 225 and 226 of the Code.

**Sec. 1733 R. S. [Proceedings thereon.]** On the day fixed by such judge for the return of the citation, it shall be the duty of the solicitor to appear on behalf of the complainant to conduct the prosecution, and the accused may also appear by counsel, and a time shall be set for hearing the case, which time shall not be more than ten days after such return; and if a jury is demanded by either party, the probate judge shall direct the summoning of twelve men, in the manner provided in the seventh division of this title: provided, that in villages and cities in which there is no office of solicitor, or where the solicitor is accused of any misfeasance or malfeasance in his office, it is hereby made the duty of the prosecuting attorney of the county to appear on behalf of such complainant to conduct the prosecution. [68 v. 113, § 2.]

**Sec. 1734 R. S. [Challenge of jurors.]** On the day fixed for the trial, if a jury is impaneled, either party may, in addition to the peremptory challenges allowed by law in other cases, object, for good cause, to any jurymen summoned; and any vacancies occurring for any cause, may be filled by the probate judge from the bystanders, until the panel is full, unless the

party charged, or his counsel, demand a special venire to fill such vacancy. [68 v. 113, § 3.]

**Sec. 1735 R. S. [The trial.]** On the day designated for the trial, it shall take place, unless continued, on affidavit for good cause, to another fixed time, not exceeding ten days; and on the trial it shall be the duty of the solicitor to appear for the prosecution, examine witnesses designated by the complainant, and such others as he may discover, and either party may have process from the probate judge to compel the attendance of witnesses. [68 v. 114, § 4.]

**Sec. 1736 R. S. [Removal of officer, if found guilty; costs.]** If the charges in the complaint are sustained on the trial by the verdict of the jury, or the decision of the probate judge when there is no jury, such judge shall enter the charges and findings thereon upon the record of the court, and make an order removing such officer from office and forthwith transmit a certified copy of the same to the presiding officer of the council, whereupon the vacancy shall be filled as provided by law; and the costs and expenses of the trial shall be charged upon the party filing the complaint, the accused, or the municipal corporation, or apportioned among them, as the judge may see fit to direct, and shall be collected as in other cases: provided, no costs or expenses shall be charged to the accused, if upon such trial he is acquitted; and provided further, that if proceedings in error are instituted by the officer complained of, to reverse or vacate the order of the probate court, such officer shall not exercise the functions of his office until such order is finally reversed or vacated. [68 v. 114, § 5.]

#### 4. UNIFORM ACCOUNTING BY OFFICERS.

An act to create a bureau of inspection and supervision of public offices, and to establish a uniform system of public accounting, auditing and reporting, under the administration of the auditor of State.

[Sec. 1.] [Bureau of inspection and supervision of public offices. Chief inspector, etc.; deputies and clerk; appointment, salary and expenses.] There is hereby established in the department of the auditor of state, a bureau to be known as the bureau of inspection and supervision of public offices; the principal officer of said bureau shall be known as the chief inspector and supervisor of public offices; the auditor of state shall be, *ex officio*, chief inspector and supervisor of public offices, and as such chief inspector and supervisor, shall appoint not exceeding three deputies, no more than two of whom shall be of the same political party, who shall each receive a salary not exceeding two thousand dollars per annum, and a clerk who shall receive a salary not exceeding fifteen hundred dollars per annum, and in addition thereto an allowance for all necessary traveling and hotel expenses while absent from their places of residence in the discharge of their official duties. [May 10, 1902, 95 v. 511.]

[Sec. 2.] [Duty of auditor of state.] The auditor of state through said bureau shall formulate, prescribe and install a system of accounting and reporting, in conformity with the provisions of this act, that shall be uniform for every public office and every public account of the same class, and which shall exhibit true accounts and detailed statements of funds collected, received and expended for account of the public for any purpose whatever, and by all public officers, employes or other persons, such accounts to show the receipt, use and disposition of all public property, and the income, if any, derived therefrom, and of all sources of public income and the amounts due and received from each source, all receipts, vouchers and other documents kept, or that may be required to be kept, necessary to isolate and prove the validity of every transaction, and all statements and reports, made or required to be made, for the internal administration of the office to which they pertain, and all reports published, or that may be required to be published, for the information of the people, regarding any and all details of the financial administration of public affairs. [May 10, 1902, 95 v. 512.]

[Sec. 3.] [Separate accounts.] Separate accounts shall be kept for every appropriation or fund made by a taxing body,



showing date and manner of each payment made out of the funds provided by such appropriation, the name, address and vocation of each person, organization, corporation or association, to whom paid, and for what purpose paid. Separate accounts shall be kept for each department, public improvement, undertaking, institution and public service industry under the jurisdiction of every taxing body, and of the state, and all service rendered by, or property transferred from one department, public improvement, undertaking, institution or public service industry to another, shall be paid for at its true and full value by the department, public improvement, undertaking, institution or public service industry receiving the same, and no department, public improvement, undertaking, institution or public service industry shall benefit in any financial manner whatever by an appropriation or fund made for the support of another department, public improvement, undertaking, institution or public service industry. All unexpended balances or appropriations shall be transferred to the fund from which appropriated whenever the account with an appropriation is closed. [1904, April 23, 97 v. 272; 95 v. 512:]

[**Sec. 4.**] [**Public service industries.**] Separate accounts shall be kept for every public service industry which shall show the true and entire cost of the ownership and operation thereof, the amount collected annually by general or special taxation for services rendered to the public and the amount and character of the service rendered therefor, and the amount collected annually from private users, if any, for service rendered to them, and the amount and character of the service rendered therefor. [May 10, 1902, 95 v. 512.]

[**Sec. 5.**] [**Comparative statistics.**] The auditor of state through said bureau shall require from every taxing district and public institution financial reports covering the full period of each fiscal year, in accordance with the forms and methods prescribed by him, which shall be uniform for all accounts of the same class, which said reports shall be prepared, certified and filed with said bureau within thirty days after the close of each fiscal year by the auditing department of said taxing district or public institution. Such reports shall contain an accurate statement in summarized form, of all collections made by or receipts received by the officers from all sources, all accounts due the public treasury but not collected, and of all expenditures for every purpose and by what authority authorized, and also:

(a) A statement of all costs of ownership and operation

and of all income of each and every public service industry owned and operated by a municipality.

(b) A statement of the entire public debt of every taxing district to which power has been delegated by the state to create a public debt, showing the purpose for which each item of the debt was created, the provisions made for the payment of the debt, together with such other information as may be required by the auditor of state. Such reports shall be certified as to their correctness by said auditor of state, his deputies, or by a state examiner, or other person legally authorized to make such certificate.

Their substance shall be published in an annual volume of comparative statistics that shall be issued for each class of accounts at the expense of the state as a public document, and shall be submitted by the auditor of state to the governor for transmittal to the legislature at the next regular session, or at a special session when required. [1904, April 23, 97 v. 272; 95 v. 513.]

[Sec. 6.] [Duty of public officer.] It shall be the duty of every public officer and employe to keep all accounts of his office in the form prescribed and to make all reports required by the auditor of state. Refusal or neglect to perform these duties shall be deemed an offense against the efficiency of public administration and the welfare of the people, and shall be punished by removal from office, after trial and conviction by a court of competent jurisdiction. Every public officer and employe whose duty it is to collect or receive payments due the public shall deposit all public moneys collected or received by him with the treasurer of the taxing district once every twenty-four consecutive hours. In case a public officer or employe collects or received funds for the account of a taxing district of which he is not an officer or employe, he shall during the Saturday of each week, pay to the proper officer of the taxing district for account of which the collection was made or payment received, the full amount collected or received during the current week for the account of such taxing district. [95 v. 514; 97 v. 273.]

[Sec. 7.] [State examiners; appointment, salary, etc.] After the bureau of inspection and supervision shall have formulated and installed the system of uniform accounting in any or all classes of public offices, the auditor of state is hereby empowered to appoint additional assistants as required to administer the provisions of this act; said additional assistants shall be known as state examiners who shall each be paid five dollars per day

for the time necessary to the performance of his duties, and in addition thereto his necessary expenses incurred. [May 10, 1902, 95 v. 514.]

[Sec. 8.] [Powers of auditor of state.] The auditor of state, a deputy inspector and surveyor, and every state examiner shall have power by himself or by any person legally appointed to perform the service, to examine into all financial affairs of every public office and officer, and shall make such examination at least once a year. On every such examination inquiry shall be made as to the financial conditions and resources of the taxing district; whether the constitution and statutory laws of the state, the ordinances and orders of the taxing district and the requirements of the bureau of inspection and supervision of public offices have been properly complied with; and into the methods and accuracy of the accounts and reports. The auditor of state, his deputies, every state examiner and every person legally appointed to perform such service, shall have and may exercise all the authority to issue subpœna and compulsory process and to direct the service thereof by any constable or sheriff, to compel the attendance of witnesses and the production of books and papers before him at any designated time and place, to administer oaths and to punish for disobedience of subpœna, or refusal to be sworn or to answer as a witness, or to produce books and papers, which is conferred by law upon courts or officers authorized to take depositions. Wilful false swearings in such examinations shall be perjury, and shall be punishable as such. A report of such examination shall be made in duplicate, one copy to be filed in the office of the auditor of state and one in the auditing department of the taxing district reported upon. If any such examination discloses malfeasance, misfeasance or non-feasance in office on the part of any public officer or employe, an additional copy of such report shall be made and forwarded to the proper legal authority of the taxing district for such legal action as is proper in the premises. Refusal, neglect or failure on the part of the proper legal authority of the taxing district to take prompt and efficient legal action by civil process to carry into effect the findings of any such examination or to prosecute the same to a final conclusion, shall give to the auditor of state, through the attorney-general's department of state, the right to institute the necessary civil proceedings or to participate therein, and to prosecute the same in any of the courts of the state to a final conclusion. [95 v. 514; 97 v. 273.]



[Sec. 9.] [Expense of maintaining and operating bureau; how paid.] The expense of maintaining and operating the bureau herein provided for shall be paid by the several counties out of the general county fund, in proportion to their population as shown by federal census next preceding the levy hereby authorized, and the auditor of state is hereby authorized and empowered to levy upon, and collect from each county in the state its proportion of said expenses; said amount shall be paid semi-annually during the months of June and December of each year following the passage of this act, and shall in the aggregate be only sufficient to pay said expenses. The same shall be paid in vouchers of the auditor of state, and all funds received by the auditor of state on this account shall be covered into the state treasury to the credit of bureau of inspection and supervision account. [May 10, 1902, 95 v. 514.]

[Sec. 10.] [Expense of audit.] The expenses of auditing public accounts shall be borne by each taxing district for the auditing of all accounts under its jurisdiction, and the auditor of state is hereby authorized and empowered to certify the expense of such audit to the auditor of the county in which said taxing district is situated, who shall promptly issue his warrant on the county treasurer payable out of the general fund of the county, said fund, except as to auditing the financial affairs and making inspections and examinations of the county, to be reimbursed by the county auditor out of the moneys due said taxing district at the next semi-annual settlement of the collection of taxes.<sup>1</sup> [95 v. 514; 87 v. 274.]

**Validity.**—This act held constitutional. State *ex rel.* v. Schumate, 72 O. S. 487.

## 5. PROVISION AS TO CONTRACTS BY OFFICERS.

**Sec. 799a R. S.** [Limitation on the amount of bonds hereinbefore required; qualification of sureties; penalty.] The bonds provided for and required to be taken by any board or officer of the county, township, city, town, village or school district of the state, by virtue of sections *seven hundred and ninety-four*,<sup>1</sup> *seven hundred and ninety-five*, *seven hundred and ninety-six* and *seven hundred and ninety-seven*, as amended, and sections *seven hundred and ninety-eight* and *seven hundred and ninety-nine* of the Revised Statutes, shall not exceed fifty per cent. of the estimated cost of any public building, bridge superstructure or bridge substructures, or repairing, altering or rebuilding the same, and the officers named herein may require the person

or persons on the bond of the successful bidder or bidders to qualify that they are residents of the state of Ohio, and are jointly worth a greater sum than the amount named in the bond over and above all liabilities and exemptions allowed by law. Any officer violating any of the provisions of chapter *twelve*<sup>2</sup> shall be fined in any sum not exceeding one thousand dollars. [1888, April 13: 85 v. 218, 222.]

(1) § 794 is re-enacted in § 143 section occurs, there is no "Chapter of the Code. 12."

(2) In Title VI. in which this

## II

### JUDICIAL.

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#### 1. POLICE COURT.<sup>1</sup>

##### (A) JURISDICTION OF COURT AND JUDGE.<sup>2</sup>

**Sec. 1785 R. S. [Police court.]** In cities of the first class, and in cities of the third grade, third grade *a*, and third grade *c*, of the second class,<sup>3</sup> there shall be a court, held by the police judge, which court shall be styled the police court,<sup>4</sup> and be a court of record.<sup>5</sup> Provided that in cities of the third grade *c*, the city council by a two-thirds vote may abolish the office of police judge and vest the mayor of said city with all the powers of a police judge as provided by the Revised Statutes of the state of Ohio; and when such office of police judge has been so abolished, it shall not be again re-established except by a like vote of council, but no action of council shall extend or curtail the term of office of a mayor or police judge who may be serving at the time the change may be made by council. [93 v. 615; 89 v. 19; 88 v. 161; 84 v. 26, 27; 82 v. 54, 58; Rev. Stat. 1880; 72 v. 51, § 168.]

(1) **Title, division and chapter.** The sections given under 1 were contained in Chap. 1, Div. 5, Title XII of Revised Statutes.

(2) Sections under (a) were contained in sub-division 1 of Chap. 5, Div. 5, Title XII R. S.

(3) See note under § 190 of the Code.

(4) **Prosecutions brought in the name of corporation.**—Offenses against municipal corporations are regarded as quasi-criminal,

and may be prosecuted in the name of the corporation. *Markle v. Akron*, 14 O. 586.

(5) **Court of record.**—See *Terry v. State*, 22 C. C. 16.

**Special police court acts** among the sections contained in the repeals by the Code are as follows: *Akron*, 1707*b* R. S.; *Cincinnati*, 1708*a* R. S.; *Cleveland*, 1545-13, 1544-45, 1545-71 R. S.; *Columbus*, 1545-100, 1545-122, 1545-138, 1545-148 R. S.; *Dayton*, 1744*a* R. S.

**Sec. 1785*a* R. S. [Police court in certain cities.]** In cities of the first grade of the second class, there shall be a court held by the police judge, which court shall be styled the police court



and be a court of record. The provisions of the Revised Statutes and the amendments thereto relating to police courts and the officers thereof, not inconsistent with this act, are hereby made applicable to police courts and the officers thereof in cities of the first grade of the second class. [88 v. 67.]

**Sec. 1785b R. S. [Election of police judge and prosecuting attorney.]** In such cities of the first grade of the second class, there shall be chosen by the electors, at the first annual municipal election after the passage of this act, a police judge and prosecuting attorney of the police court, each of whom shall serve for the term of three years and until their successors are elected or appointed and qualified, and thereafter as the terms of such officers expire, their successors shall in like manner be elected to serve for three years; vacancies shall be filled by the mayor for the unexpired term. In such cities the secretary of the board of police commissioners shall be *ex officio* clerk of the police court. [88 v. 67.]

**Sec. 1785c R. S. [Dayton police court; laws governing.]** In cities of the second grade of the second class there shall be a court held by the police judge, which court shall be styled the police court, and be a court of record. The provisions of the Revised Statutes and the amendments thereto relating to police courts and the officers thereof, not inconsistent with this act, are hereby made applicable to police courts and the officers thereof in cities of the second grade of the second class. [89 v. 136.]

**Sec. 1785d R. S. [Election and term of judge and clerk; vacancies; prosecuting attorney.]** In such cities of the second grade of the second class there shall be chosen by the electors, at the first annual municipal election after the passage of this act, a police judge, who shall serve for the term of three years and until his successor is elected or appointed and qualified; and a clerk of the police court, who shall serve for the term of three years and until his successor is elected or appointed and qualified; and thereafter, as the terms of such officers expire, their successors shall in like manner be elected to serve for the terms provided above, respectively, for such officers. Vacancies in the office of police judge shall be filled by the governor for the unexpired term. Vacancies in the office of the clerk of the police court shall be filled by the mayor for the unexpired term. A prosecuting attorney of the police court shall be appointed by the board of police directors of such city within three days after the first election and qualification of the police judge provided for herein. The prosecuting attorney shall

serve for the term of three years and until his successor is elected or appointed and qualified, and thereafter, as the term of such officer expires, his successor shall in like manner be appointed by such board of police directors to serve for a like term. Vacancies shall be filled by such board of police directors for the unexpired term. The clerk and the prosecuting attorney shall receive no fees or perquisites, but the clerk shall receive an annual salary of twelve hundred dollars, and the prosecuting attorney shall receive an annual salary of fifteen hundred dollars, both payable monthly out of the city treasury. [89 v. 136.]

**Sec. 1785e R. S. [Ashtabula police court.]** In cities of the fourth grade *a* of the second class there shall be a court held by a police judge, which court shall be styled the police court, and be a court of record. The provisions of the Revised Statutes and all acts amendatory and supplementary thereto relating to police courts throughout the state, and the officers thereof, not inconsistent with the provisions of this act, are hereby made applicable to police courts and the officers thereof, in cities of the fourth grade *a* of the second class. [91 v. 59.]

**Sec. 1785f R. S. [Election and term of judge; vacancies; clerk; deputy.]** In cities of the fourth grade *a* of the second class there shall be chosen by the electors, at the first annual municipal election after the passage of this act, a police judge, who shall serve for the period of three years and until his successor is elected or appointed and qualified, and thereafter, as the term of such judge expires, his successor shall in like manner be elected, to serve for the period of three years; vacancies in the office shall be filled by the governor. Such judge shall be *ex officio* clerk of his own court, with all of the powers and duties now conferred upon clerks of the police courts by the provisions of the Revised Statutes, and the acts amendatory and supplementary thereto, not inconsistent with this act; provided, that he shall be entitled to a deputy clerk of the police court who may perform any duty of his principal, who shall be appointed by such police judge by and with the consent of the council of such cities, when by them deemed necessary, and who shall receive such compensation for his services as the council shall prescribe. Such judge and *ex officio* clerk and also such deputy clerk of the police court shall give such bond, with sureties, as the council of such cities may require. [91 v. 59.]

**Sec. 1785g R. S. [Election of police judge in Portsmouth; clerk of police court; vacancy.]** In cities of the second class,

third grade *c*, there shall be chosen by the electors therein, at the first annual municipal election held after the passage of this act, a police judge, who shall serve for the term of three years, and until his successor is elected or appointed and qualified, and thereafter, as the term of such officer expires, his successor shall in like manner be elected to serve for the term herein provided, and the police judge in such city shall be *ex officio* clerk of the police court; and a vacancy in the office of such police judge shall be filled by the governor until the next municipal election, when it shall be filled for the unexpired term. [93 v. 615.]

**Sec. 1786 R. S. [Seal.]** Said court shall have a seal, with the name of the state in the center, and the style of the court in the margin; and it shall be the duty of council to furnish such seal. [72 v. 51, § 168.]

**Sec. 1787 R. S. [General jurisdiction to inquire into crimes, etc.]** The jurisdiction of said court to make inquiry in criminal cases shall be the same as that of a justice of the peace,<sup>1</sup> and the judge shall have the same power to take acknowledgment of deeds,<sup>2</sup> and other instruments of writing, administer oaths, and take and certify depositions. [66 v. 176, § 166; (S. & S. 797; S. & C. 1520, 1521).]

(1) **What jurisdiction may be conferred.**—Police courts may be given jurisdiction of offenses committed outside city limits. *Ex parte* Hagenschneider, 7 N. P. 313; *Fletcher v. State*, 18 C. C. 674.

But see *contra*, *State v. Voris*, 8 N. P. 16.

**Information supported by oath.**

—One charged with a misdemeanor or was prosecuted by information.

The information being unsupported by oath or affirmation, held, a motion to quash will lie. *Eichenlaub v. State*, 36 O. S. 140.

**Mistake in sentence.**—See *Lee v. State*, 32 O. S. 113.

(2) **Acknowledgments.**—A justice of the peace or mayor may take acknowledgments outside his county. *Crumbaugh v. Kugler*, 2 O. S. 373; *Moore v. Moore*, 3 O. S. 154.

### An act to confer jurisdiction upon police courts.<sup>1</sup>

[Sec. 1.] [Police court; final jurisdiction of.] The police court shall have jurisdiction of any offense under any ordinance of the city, and of any misdemeanor committed within the limits of the city or within four miles thereof, to hear and finally determine the same, and to impose the prescribed penalty; but cases in which the accused is entitled to a jury trial, shall be so tried unless a jury be waived. [1904, Jan. 22, 97 v. 7.]



(1) **Sec. 1788 R. S.**—This act included in list of repeals in the corresponds to what was originally code. See note under § 191 of the section 1788 R. S. which was in Code.

**Sec. 1788—1 R. S. [Police jurisdiction in Zanesville.]** Power and authority is hereby vested in the council of all cities which by the last preceding federal census had a population of not less than 21,009 and not more than 21,020, or which at any subsequent federal census may have such population to provide by ordinance for the extension of the jurisdiction of the city ordinances for police regulation for the distance of one mile outside the corporate limits of said city. [92 v. 743.]

**Sec. 1788—2 R. S. [As to warrants and affidavits.]** Upon the passage of such ordinance by the council of any city, having such population, all ordinances of said city for police regulation will be obeyed and respected, and all affidavits and warrants shall be good as to jurisdiction if the offense charged was committed within the radius of one mile outside of the limits of said city. [92 v. 743.]

**Sec. 1789 R. S. [Hearing in felonies.]** In felonies committed within the county, the court shall have the powers of a justice of the peace to hear the case, and discharge, recognize, or commit; and if, upon such hearing, the court is of the opinion that the offense is only a misdemeanor, and that the court may entertain jurisdiction of it under [the last] section a plea of guilty of such misdemeanor may be received, and sentence and judgment pronounced; but if in such case the accused decline to enter such plea, the court, without discharging the accused, shall cause the prosecuting attorney to immediately file in the court an information against the accused for such misdemeanor, on which charge he shall be tried in that court, after an entry has been made discharging him of the felony.<sup>1</sup>

(1) **Cannot convict of felony.**— convict a person charged with a felony. Police Court has no authority to do so. State v. Hamilton, 3 C. C. 10.

**Sec. 1790 R. S. [Where, on charge of misdemeanor, proof shows felony.]** Where the charge is the commission of a misdemeanor, and the proof shows that the party has committed

a felony, the court, upon the proper affidavit being filed, shall discharge the party as to the misdemeanor, and admit him to bail or commit him, as the case may be, for the felony.

**Sec. 1791 R. S. [General powers.]** The court shall have power to issue process, preserve order, and punish contempts, summon and impanel jurors, grant new trials and motions<sup>1</sup> in arrest of judgment, suspend execution of sentence upon notice of intention to apply for leave to file a petition in error,<sup>2</sup> and such other powers incident to the Court of Common Pleas,<sup>3</sup> as may be necessary for the exercise of the jurisdiction herein conferred, and the enforcement of the judgments and orders of the court. [72 v. 51, § 168; S. & C. 1521.]

(1) **New trial and motions.**—Granting new trials in Police Court are governed by same rules as those in Courts of Common Pleas in criminal cases. *Germantown v. Basore*, 22 C. C. 417.

Time for filing motion for new trial. See *Evans v. State*, 23 C. C. 103; 3 C. C. (N. S.) 23 (*aff'd* 68 O. S. 700).

(2) **Reviewable on weight of evidence.**—Judgments of a mayor of conviction for the violation of an ordinance may be reviewed on the weight of the evidence. *Flatau v. Mansfield*, 14 C. C. 592, 595. *Contra Williams v. State*, 25 O. S. 628. Since the decision in *Williams v. State supra*, the law has been changed by statute and that case no longer applies, and a conviction either in a police court or mayor's court may be reviewed on the weight of the evidence. *Germantown v. Basore*, 22 C. C. 417.

See also *Slaughter v. Columbus*, 61 O. S. 53.

But a judge of police court having the opportunity to see the witnesses is best qualified to judge of their credibility, and his findings should not be disturbed unless manifestly wrong. *Evans v. State*, 23 C. C. 103; *Niefeld v. State*, 23 C. C. 246.

(3) **Powers incident to Court of Common Pleas.**—Judge of police court or mayor may allow time to sign bill of exceptions. *Germantown v. Basore*, 22 C. C. 417, 421.

They are governed by same rules as in civil cases in Court of Common Pleas. *Ib.*

**May punish for contempt.**—By this section the police court has power to punish by contempt failure to answer subpoena. *Woods v. State*, 30 B. 290.

Written charges are not necessary. *Ib.*

**Sec. 1792 R. S. [In what name prosecutions carried on.]** Prosecutions for offenses against the laws of the state shall be brought and conducted in the name of the state, and prosecutions for violations of city ordinances shall be brought and conducted in the name of the corporation; and in any case a new trial may be granted within the same time and for the same cause as in like cases in the Court of Common Pleas.<sup>1</sup> [66 v. 177, § 196 (169); (S. & S. 798).]

(1) **Averments necessary in information.**—As to what must be averred in information. See *Massa v. State*, 3 C. C. 9.

**Sec. 1793 R. S. [Terms of the court.]** The police court shall always be open for the transaction of business, but may adjourn from day to day, or from time to time, and shall be considered as holding monthly terms, each commencing on the first Monday of the month.<sup>1</sup> [72 v. 51, § 171; (S. & S. 799).]

(1) **Holidays.**—Courts may adjourn on a legal holiday. Jones v. State, 14 C. C. 35. But it is not unlawful to hold court on holiday. *State v. Thomas*, 61 O. S. 444.

**Sec. 1794 R. S. [Mode of prosecuting, etc.]** The mode in which business shall be brought before the court shall be fixed by ordinance of the city council or rule of court.<sup>1</sup> [72 v. 51, § 171; (S. & S. 799).]

(1) **Limitation.**—The requirement that a warrant must be founded on oath or affirmation, is not dispensed with by §§ 1794 and 1795 R. S. *Eichenlaub v. State*, 36 O. S. 140, 144.

**Sec. 1795 R. S. [Rules.]** The judge shall adopt such rules of practice and procedure as will give each party a proper statement of any charge against him, and a full opportunity of being heard, which rules shall be placed in the court room. [66 v. 177, § 173; (S. & S. 799).]

**Sec. 1796 R. S. [As to dispatch of business; interpreter.]** The business of the court shall be dispatched with all the speed consistent with a full, fair trial or hearing of the cases. In cities where there is more than one police judge—the judges of the police court may appoint an interpreter for said court—and in case they fail to agree, the clerk of said court may appoint an interpreter for said court for the term of two years who shall receive as compensation fifteen hundred dollars per year.

Said interpreter shall attend all sessions of said court and obey all orders of the judges of said court; he shall receive no fees while acting in the capacity of interpreter and said judges shall have power for adequate cause to remove said interpreter. [1904, April 25, 97 v. 387; 90 v. 256; 88 v. 99; 66 v. 177.]

**Sec. 1797 R. S. [Salary of judge.]** The judge of the police court shall receive no fees or perquisites, but shall receive such annual compensation, not exceeding two thousand dollars, as the council may prescribe, payable quarterly out of the city treas-



ury, and such further compensation payable out of the county treasury, as the commissioners of the county may deem proper; but in cities of the first grade of the first class such judge shall receive not less than fifteen hundred dollars a year from the city treasury, and not less than fifteen hundred dollars a year from the county treasury; and in cities of the first grade of the second class, such judge shall receive a salary of two thousand dollars per year, payable monthly, out of the city treasury; and nothing in this section shall prohibit any police judge from receiving the fees from [for] taking the acknowledgment of instruments, depositions and affidavits which are allowed to justices of the peace for like service. [88 v. 67; 66 v. 177, § 170; (S. & S. 798).]

**Sec. 1797a R. S. [Salary of judge in Dayton; fees.]** In cities of the second grade of the second class, the judge of the police court shall receive no fees or perquisites, but shall receive an annual salary of two thousand dollars, payable monthly out of the city treasury, and nothing in this section shall prohibit such police judge from receiving the fees for taking the acknowledgment of instruments, depositions and affidavits which are allowed to justices of the peace for like services. [89 v. 137.]

**Sec. 1797b R. S. [Compensation of Ashtabula police judge; fees; fines.]** In cities of the fourth grade *a* of the second class the police judge and ex officio clerk of the police court, in criminal cases or prosecutions, shall receive no fees, fines or perquisites, but shall receive such annual compensation as the council of such cities shall prescribe by ordinance, payable quarterly out of the city treasury, and such further compensation payable out of the county treasury as the commissioners of the county may deem proper; provided, that such judges shall receive from the county treasury not less than two hundred dollars; provided further, that nothing in this section shall prohibit any such judge and ex officio clerk from receiving such fees in civil cases, and for taking acknowledgments of instruments, depositions, affidavits, etc., as are allowed justices of the peace for like services; and all fines and fees collected for the violation of ordinances shall be turned over to the city treasurer, by such judge, on or before the fifth day of each month, and he shall make a written statement of the number and amount of the same, and file the same with the city clerk before the first regular meeting of the council of such cities in each month, who shall report the same to the council and make a minute of the same upon the council journal; and all

finest or fees collected by him for violations of the state laws shall, on or before the first day of January, April, July and October, respectively, of each year, be turned over to the county treasurer. [91 v. 59.]

**Sec. 1797c R. S.** [Clerk of police court in Portsmouth; compensation; fees for taking acknowledgments, etc.] In cities of the second class, third grade *c*, the police judge shall be ex officio clerk of the police court, and shall receive such compensation for the performance of both the duties of police judge and clerk of police court as may be allowed him by ordinance of council, and the county commissioners, as provided in section 1808 and no more; provided, that any such police judge may receive such fees for taking acknowledgments, depositions, and affidavits, as are allowed by law to justices of the peace for like services. [93 v. 615.]

**Sec. 1798 R. S.** [Provisions as to jurors, witnesses, etc.] The court shall have power to compel the attendance of witnesses, jurors, and parties; jurors shall have the qualifications and be subject to the challenges of those in the court of common pleas in like cases; they shall be selected, summoned, and impaneled in accordance with an ordinance of the council, or if no such ordinance is in force, in accordance with a rule of the court; <sup>1</sup> and they shall receive the same fees as are allowed jurors in the court of common pleas in such cases, which shall be payable out of the county treasury in state cases, and out of the city treasury in cases for the violation of ordinances. <sup>2</sup> [66 v. 177, § 172.]

(1) **Struck jury.**—There is no law authorizing a struck jury in police court. *State ex rel. v. Erms-ton*, 4 C. C. 81.

**Where no provision for jury.**—Where there is no trial by jury provided a sentence of imprisonment by the mayor, of a person charged with

the violation of an ordinance, is illegal. *Thomas v. Village of Ashland*, 12 O. S. 124.

(2) **Payment of jury fees.**—When municipality and when state pays jury fees, see *State ex rel. v. Cappeller*, 5 B. 363.

**Sec. 1799 R. S.** [Witnesses' fees.] Witnesses in the police court shall be allowed the same fees in cases arising from a violation of the ordinances, as are allowed in like cases before justices of the peace, which shall be paid in the same manner; and in state cases the same fees as in like cases in the court of common pleas, which shall be paid in the same manner. <sup>1</sup> [66 v. 178, § 178; (S. & C. 1537).]

(1) For witness fees in cases before justices of peace and Common Pleas Court, see § 1301 R. S.

**Sec. 1800 R. S. [Other fees.]** Other fees in the police court shall be the same in state cases as are allowed in the probate court, or before justices of the peace, in like cases; and in cases for violation of ordinances such fees as the council shall, by ordinance, prescribe, not exceeding the fees for like services in state cases. [66 v. 178, § 177.]

**Sec. 1801 R. S. [Recognizances.]** In felonies, the court shall recognize such of the witnesses as will probably be required in the court of common pleas to appear in that court; one instrument, in which, under the penalty named, the witnesses shall severally undertake to appear before the court of common pleas of the county forthwith, or at the next term, as the case may be, shall be sufficient; all recognizances, whether of the accused or the witnesses, shall, when taken, be certified and entered on the journal, and forthwith delivered to the clerk of the court of common pleas; and neither coverture, nor minority, shall be a defense to any recognizance. [66 v. 178, § 176.]

**Sec. 1802 R. S. [Acting police judge; Toledo.]** During the absence, inability or disability of the judge, the mayor may hold the court, or may select for the purpose a reputable member of the bar, or a justice of the peace, residing within the city, who shall have the jurisdiction and powers conferred upon judges of police courts, be styled "acting police judge" and, as such, sign all process and records during the time he shall serve, and perform all other acts pertaining to the office; and in case the mayor hold the court, he shall have all the powers, and perform all the duties of the judge; <sup>1</sup> except, that in cities of the third grade of the first class, during the absence, inability or disability of the judge, the clerk of police court shall select for the purpose of holding court a reputable member of the bar, or a justice of the peace, residing within the city, who shall have the jurisdiction and powers conferred upon judges of police courts, be styled "acting police judge," and, as such, sign all process and records during the time he shall serve, and perform all other acts pertaining to the office. [April 29, 1902, 95 v. 293; 70 v. 248; 66 v. 170; (S. & S. 800).]

(1) **Validity.**—The power given the mayor to appoint, in the temporary absence of police judge is not in contravention of Art. 4, § 13 of the Constitution. *Molitor v. State*, 6 C. C. 263.

—Even if the power to appoint is not constitutional, yet the person acting under the appointment will be a *de facto* judge. *Ex parte Strang*, 21 O. S. 610; *Brown v. Toledo*, 7 N. P. 435.

**Where appointment defective.**

The acts of a *de facto* officer,



when questioned collaterally, are as valid and binding as those of an officer *de jure*. *Ex parte* Strang, 21 O. S. 610; *Molitor v. State*, 6 C. C. 263; and this is so even though the one appointing had only colorable authority to appoint. *Ex parte* Strang, 21 O. S. 610.

**Sec. 1803 R. S.** [Compensation of acting police judge.] The person selected as judge shall be paid for the time occupied in the same manner and at the same rate as the police judge, and the amount so paid shall not be deducted from the compensation of the police judge; provided the said absence, inability or disability of the police judge, and the holding of the court by such acting police judge, shall not exceed sixty days in any one year; and all courts shall take judicial notice of the selection and powers of such person. [1882, April 11; 79 v. 85; Rev. Stat. 1880; 70 v. 248, § 174; 66 v. 170, § 124.]

#### (B) CLERK OF POLICE COURT.<sup>1</sup>

**Sec. 1804 R. S.** [Clerk of police court: his powers.] The clerk of the police court shall have power, when an affidavit is filed with him for a peace warrant, search warrant, or charging any person with the commission of an offense, to issue a warrant under seal of said court to arrest the accused or search the place described; to admit to bail any person accused of a misdemeanor or violation of an ordinance for his appearance at the next sitting of the police court or mayor, as the case may be; and the bond given to continue until the case is finally disposed of; and also to admit to bail any person accused of a felony when the amount of bail has been fixed by the court or mayor, as the case may be; to appoint one or more deputies to be approved by the council, to administer oaths and to perform all other things which may be performed by the clerk of the court of common pleas in like cases.<sup>2</sup> [92 v. 98; 84 v. 26, 27; 83 v. 68; Rev. Stat. 1880; 67 v. 72, § 185; 66 v. 178, § 182.]

(1) The sections under this heading were contained in sub-division 2 of Chap. 1, Div. 5, Title XII R. S. Issuing a warrant is a ministerial and not a judicial act. *Molitor v. State*, 6 C. C. 263.

(2) **Section constitutional.** —

**Sec. 1805 R. S.** [Duties as to papers.] He shall file and preserve all informations, process, motions, and papers of every description used in the court, except such as he may be required to transmit to another court. [66 v. 179, § 187; (S. & C. 1537).]

**Sec. 1806 R. S. [Journal; record.]** He shall keep a journal of all orders and judgments of the court, and on the opening of the court on any day, the minutes of the preceding day shall be read, and signed by the judge, the errors, if any, being first corrected; and the entries on the journal in any case, in connection with the information and other papers, shall constitute and have the force of, a final record. [66 v. 179, § 187; (S. & C. 1537).]

**Sec. 1807 R. S. [Report.]** He shall, on the first Monday of every month, make, under oath, to the city auditor, a report of all fines, penalties, fees, and costs imposed by the court in city cases, showing in what cases the same have been paid, and in what cases they remain unpaid; and also, at the same time, he shall make a like report to the county auditor as to state cases; and he shall immediately pay into the city and county treasuries, respectively, the amount then collected, or which may have come into his hands, from all sources, during the preceding month. [66 v. 179, § 189.]

**Sec. 1808 R. S. [His bond and compensation.]** He shall give such bonds, with sureties, as may be required by the council and county commissioners, and shall receive for his services, in city cases, a fixed salary to be prescribed by ordinance of the council, not more than two thousand dollars per annum, and for state cases such further allowance, not more than two thousand dollars per annum, payable out of the county treasury, as the county commissioners may deem proper. [1904, April 19, 97 v. 101; 93 v. 615; 91 v. 195; 91 v. 158; 89 v. 19; 88 v. 161; 84 v. 26, 27; 83 v. 68; Rev. Stat. 1880; 66 v. 178.]

**Sec. 1809 R. S. [Powers, salary, and bonds of deputy clerk; Cincinnati, Cleveland and Toledo.]** A deputy clerk of the police court may perform any duty of the principal; he shall receive such compensation as the council may prescribe, but not exceeding fifteen nor less than seven hundred dollars per year; and such further compensation in cities of the first class of the first grade as the county commissioners shall determine, but not exceeding six hundred dollars per year and such further compensation in cities of the first class of the second or third grade as the county commissioners shall determine, but not exceeding five hundred dollars per year; and the principal may take from him an undertaking, with sureties, for the faithful performance of such official duties. [92 v. 401; 85 v. 7; 83 v. 68; Rev. Stat. 1880; 67 v. 72, § 135; (S. & S. 799).]

**Sec. 1810 R. S. [Inability or absence of clerk; substitute.]**

When there is a temporary inability or absence of the clerk and no deputy has been appointed, or where a vacancy of the office occurs by resignation, death, or otherwise, the judge, or if there be more than one judge then the judges, of said court may appoint some competent person who, upon giving the bond and taking the oath of office prescribed, shall have the powers and perform the duties of the clerk; and the person so appointed shall be paid out of the city treasury, on the order of the council, at the same rate the clerk is paid for similar services; but in no case of temporary inability, or absence, such appointment shall be valid only until the inability be removed or the clerk return. [94 v. 69; Rev. Stat. of 1880; 66 v. 179, § 186.]

**Sec. 1811 R. S.** [Clerk and deputy not to practice in certain cases.] Neither the clerk nor his deputy shall be concerned as counsel or agent in the prosecution or defense of any case that is or has been before the court.<sup>1</sup> [66 v. 179, § 188.]

(1) See § 1817a R. S. *infra*, p. 581.

**Sec. 1812 R. S.** [Surplus fees after payment of expenses.] If there be any surplus of the fees collected for the city, after payment of the expenses of the police court required to be paid by the city, such surplus shall, in cities of the first class, except as otherwise provided by law, be appropriated by council for the benefit of the common schools of the city. [1887, Feb. 17: 84 v. 26, 27; Rev. Stat. 1880; 66 v. 179, § 190.]

### (C) PROSECUTING ATTORNEY.<sup>1</sup>

**Sec. 1814 R. S.** [Salary.] He shall receive for his services in city cases such salary as the council may prescribe, which shall be paid out of the city treasury; and the county commissioners shall allow him such further compensation as they deem proper, not exceeding fifteen hundred dollars per annum, which shall be paid out of the county treasury; but in cities of the first grade of the second class the prosecuting attorney shall receive an annual salary of fifteen hundred dollars payable monthly out of the city treasury. [90 v. 169; 88 v. 68; 66 v. 179, § 192; (S. & C. 1536).]

(1) The sections under headings "c" and "d" were contained in subdivision 3, Chap. 1, Div. 5, Title XII R. S. §§ 1813 and 1815 R. S.

omitted here, are incorporated in § 137 of the Code, under which section they may be found.



## (D) POLICE JUDICIAL DISTRICTS IN CLEVELAND.

**Sec. 1815—1 R. S. [Police judicial districts and police justices (Cleveland); jurisdiction, etc.]** In cities of the first class and second grade, the city council shall have the power to designate as many police judicial districts as may from time to time be necessary, and shall provide for the election, term of office and compensation and territorial jurisdiction of a police justice for each police judicial district, but nothing in this act shall prevent police judges from having jurisdiction in any and all cases in any police judicial district as herein provided for. The city council shall provide a place where each police justice shall hold his court, prescribe the procedure therein, appoint a clerk for each district, fix his compensation, term of office and his duties, subject to the provisions of this act. These courts shall have official seals, to be furnished by the city, on which shall be engraved the state arms and the words "Police judicial district No. — of Ohio." [89 v. 306.]

**Sec. 1815—2 R. S. [Regulations governing courts.]** Said police court justices shall hold their courts under and subject to such regulations as may be prescribed by the city council. [89 v. 306.]

**Sec. 1815—3 R. S. [Jurisdiction and powers of police justices; sessions; process.]** Said police justices shall have final jurisdiction in all cases of violation of any ordinance of the city in which they are located, except in cases where the accused is entitled to a jury trial, and demand the same, or in cases where the validity of an ordinance is involved; in which cases, the police justice shall forthwith certify the case with all the papers and certified copies of the docket entries to the police court. The said police justices shall have power to issue processes and preserve order and punish for contempt, grant motion for new trials, motions in arrest of judgment, suspend executions of sentence upon notice of intention to apply for leave to file petition in error, and shall exercise all other powers necessary in the exercise of their jurisdiction. Said court shall always be open for business, and the processes issued by said courts shall be served by the police force of said cities. [89 v. 306.]

**Sec. 1815—4 R. S. [Rules of practice and procedure.]** Said police justices shall have power to make such rules of practice and procedure as are necessary to the exercise of their jurisdiction and allow the accused a full opportunity of being heard. [89 v. 306.]

**Sec. 1815—5 R. S. [Powers, duties and bond of clerks.]** The clerks of said police districts shall have power to administer oaths, admit to bail, qualify sureties on bail bonds, and shall keep a full record of the proceedings of said courts; shall collect all fines and penalties and pay the same into the city treasury; and shall give a good and sufficient bond for the faithful performance of the duties in such sum as the city council shall determine. [89 v. 306.]

**Sec. 1815—6 R. S. [Compensation of police justices.]** The compensation of a police justice shall not be less than \$1,500 per annum, payable quarterly from the city treasury. [89 v. 306.]

**Sec. 1815—7 R. S. [Election, appointment, etc., of justices.]** Said police justices shall be elected on the first municipal election held after the passage of this act; and the mayor of any city of the second grade and first class may appoint some suitable person or persons for each police judicial district in their respective cities, who shall hold the position until said election, with the full powers and subject to all the provisions of this act; provided, the city council shall make the divisions as provided in section 1 [§(1815—1)] of this act; and if a vacancy should occur or any police justice be unable from absence, sickness or other cause to hold court, then the mayor may designate some suitable person, who shall hold court during said absence or inability of the police justice, or until the vacancy is filled by election. [89 v. 306.]

**Sec. 1815—8 R. S. [Power of clerk to adjourn court.]** The clerk of each police judicial district shall have power to adjourn court in the absence of the justice. [89 v. 306.]

## 2. POLICE POWER OF MAYOR, POLICE JUSTICE, ETC.<sup>1</sup>

### (A) IN CITIES EXCEPT OF THE FIRST CLASS.<sup>2</sup>

**Sec. 1816 R. S. [Final jurisdiction in city cases.]** In cities, other than those which have a police court, the mayor shall have final jurisdiction to hear and determine any prosecution for the violation of an ordinance of the corporation, unless imprisonment is prescribed as part of the punishment. [66 v. 169, § 114; 69 v. 192, § 117.]

(1) Sections under this heading were contained in Chap. 2, Div. 5, Title XII R. S.

(2) This was subdivision 1 of Chap. 5.

**Sec. 1817 R. S. [Final jurisdiction of certain state cases.]** He shall have final jurisdiction to hear and determine any prosecution for a misdemeanor, unless the accused is, by the

constitution, entitled to a trial by jury,<sup>1</sup> and his jurisdiction in such cases shall be co-extensive with the county. [66 v. 169, § 114; 69 v. 192, § 117.]

(1) **No jury trial, when.**—In cases where fine is the punishment, and imprisonment is provided only when fine is not paid, defendant has no right to jury trial, and mayor may try the case. *Ward v. State*, 5 N. P. 81; see also *Inwood v. State*, 42 O. S. 186; *Peters v. State*, 8 N. P. 595; 67 O. S. 494.

Entering a plea of guilty is a waiver of jury trial. *Hillier v. State*, 26 C. C. 777; 5 C. C. (N. S.) 245.

**Final jurisdiction** under the circumstances mentioned is clearly given in this section, and it must be construed as an exception to the general provisions of § 7146 R. S.

*State v. Borham*, 72 O. S. 358. See also *Dominick v. State*, 27 C. C. 305; 6 C. C. (N. S.) 192.

**Change of venue** in misdemeanor prosecutions before mayor not authorized. *Fike v. State*, 25 C. C. 554. And see *Kappes v. State*, 25 C. C. 723; 4 C. C. (N. S.) 14.

**Review on weight of evidence.**

—A conviction for a misdemeanor before a mayor, over which he has final jurisdiction, may be reviewed by a proceeding in error on the ground that the conviction is against the weight of the evidence. *Koch v. State*, 73 O. S. 131. See *Fike v. State*, 25 C. C. 554; 4 C. C. (N. S.) 81.

**Sec. 1817a R. S.** [Clerk of mayor's court not to be concerned in prosecution or defense.] Neither the clerk of the mayor's court, nor his deputy, shall be concerned as counsel or agent in the prosecution or defense of any case that is or has been, before the court of which such person is clerk or deputy. [1881, March 11: 78 v. 50.]

**Sec. 1813 R. S.** [Jurisdiction where jury is waived.] He shall have such jurisdiction in the cases mentioned in the last two sections, notwithstanding the right to a jury, if before the commencement of the trial, the accused waive a jury trial.<sup>1</sup> [66 v. 169, § 114; 69 v. 192, § 117.]

(1) **When record silent as to waiver.**—When defendant is entitled to jury trial, and the record is silent as to waiver, no jurisdiction is shown. *Ward v. State*, 5 N. P. 81.

**Sec. 1819 R. S.** [Certain city cases must be tried by jury.] If the charge is the violation of an ordinance in a matter with respect to which imprisonment may be a part of the punishment, and the accused does not waive a jury, the mayor shall, nevertheless, impanel a jury, and try the case on the affidavit, in the same manner, and with like effect, as misdemeanors are tried in the court of common pleas on indictment.<sup>1</sup> [66 v. 169, § 114; 69 v. 192, § 117.]

(1) Cited in *Morgan v. Nolte*, 37 O. S. 23.

**Sec. 1820 R. S.** [Certain state cases may be tried by jury.] If the charge is the commission of a misdemeanor, prosecuted in the name of the state, and the accused, being entitled to a jury,



does not waive the right, the mayor may, nevertheless, impanel a jury, and try the case on the affidavit, in the same manner, and with like effect, as such cases are tried in the court of common pleas on the indictment. [66 v. 169, § 114; 69 v. 192, § 117.]

**Sec. 1821 R. S.** [In certain state cases accused may be recognized, etc.] The mayor may, however, decline to have such state case tried before him by a jury, if in his opinion the public interest will thereby be promoted, and, having entered that fact on his minutes, inquire into the complaint, discharge the accused, or recognize him to the court of common pleas or probate court, as the case may be, or commit him in default of bail.<sup>1</sup> [66 v. 169, § 114; 69 v. 192, § 117.]

(1) **Money in lieu of bail.**—Where a person arrested for violating a penal statute, makes an agreement with mayor to deposit money in lieu of bail, and said money is deposited into the treas-

ury, it cannot be recovered back. *Columbus v. Reinhard*, 1 C. C. 289.

Mayor has discretion to refuse a jury trial and hold the accused to answer to a higher court. *Hillier v. State*, 26 C. C. 777; 5 C. C. (N. S.) 245.

**Sec. 1822 R. S.** [Jurisdiction in felonies, etc.] In felonies, and other criminal proceedings not herein provided for, such mayor shall have jurisdiction and power, throughout the county, concurrent with justices of the peace.<sup>1</sup> [66 v. 169, § 114; 69 v. 192, § 117.]

(1) Criminal jurisdiction of justices of the peace is provided in § 610 R. S.

#### (B) IN VILLAGES.<sup>1</sup>

**Sec. 1823 R. S.** [Final jurisdiction under ordinances.] In villages, the mayor shall have final jurisdiction to hear and determine any prosecution for the violation of an ordinance of the corporation, unless imprisonment is prescribed as part of the punishment.<sup>2</sup> [66 v. 169, § 114; 69 v. 192, § 117.]

(1) This was Subd. 2 in Chap. 2, Div. 5, Title XII R. S. § 1843 omitted here is incorporated in § 200 of the Code, page 451

cused of violating an ordinance, who after giving bail to appear at a certain time fails to appear at the hour fixed for trial. *Truman v. Walton*, 59 O. S. 517.

(2) **In absence of accused.**—The mayor cannot try a person ac-

**Sec. 1824 R. S.** [Jurisdiction in certain state offenses.] He shall have final jurisdiction to hear and determine any prosecution for a misdemeanor, unless the accused is by the constitution entitled to a trial by jury; and his jurisdiction in such cases

shall be co-extensive with the county.<sup>1</sup> [66 v. 169, § 114; 69 v. 192, § 117.]

(1) **Tribunals of limited jurisdiction** must at their peril keep within their jurisdiction and are answerable to anyone whose rights are invaded; and, honesty of purpose, while it may mitigate damages, cannot justify a usurpation of power. *Truman v. Walton*, 59 O. S. 517; *Truesdell v. Combs*, 33 O. S. 186.

**Constitutionality.**—This section giving jurisdiction coextensive with the county is constitutional. *Carey v. State*, 70 O. S. 121; *Kubach v. State*, 2 C. C. (N. S.) 133, 25 C. C. 489.

**Affidavit of prejudice** not allowed. § 550 R. S. has no application to mayors. *Carey v. State*, 70 O. S. 121; nor has § 6529 R. S. *Kappes v. State*, 5 C. C. (N. S.) 183.

**Information** not necessary to be filed. Misdemeanor cases may be instituted upon filing affidavit. *Kubach v. State*, 2 C. C. (N. S.) 133; 25 C. C. 489.

**Jury** not necessary where fine only is punishment. *Kubach v. State*, 2 C. C. (N. S.) 133; 25 C. C. 489; *Harlow v. State*, 1 N. P. (N. S.) 323; *Wells v. State*, 1 N. P. (N. S.) 309.

**Sec. 1825 R. S. [Jurisdiction when jury is waived.]** He shall have the jurisdiction in the cases mentioned in the last two sections, notwithstanding the right to a jury, if before the commencement of the trial, a waiver in writing, subscribed by the accused, is filed in the case. [66 v. 169, § 114; 69 v. 192, § 117.]

**Sec. 1826 R. S. [When violation of ordinance tried by jury.]** He may summon a jury, and try the accused, in any prosecution for the violation of an ordinance, where imprisonment is a part of the prescribed punishment, and the accused does not waive a jury; and in such case, judgment shall be rendered in accordance with the verdict, unless a new trial, for sufficient cause, is granted. [66 v. 169, § 114; 69 v. 192, § 117.]

**Sec. 1827 R. S. [When he may recognize, etc., for violation of ordinance.]** He may decline to permit the trial, mentioned in the last section, if in his opinion the public interest will be thereby promoted, and having entered that fact on his docket, proceed to inquire into the complaint, and discharge the accused, recognize<sup>1</sup> him to the court of common pleas,<sup>2</sup> or commit him in default of bail; and in such case the court of common pleas shall have jurisdiction of the offense. [66 v. 169, § 114; 69 v. 192, § 117.]

(1) **When mayor may recognize.**—On disagreement by jury, the mayor may recognize accused to appear before Common Pleas Court, instead of retrying him. *Earhart v. Village of Lebanon*, 5 C. C. 578.

(2) **Procedure in Common**

**Pleas Court.**—When upon violation of a village ordinance, a mayor certifies the case to the Court of Common Pleas, the proper course is to proceed to trial upon the affidavit filed before the mayor. *Finnical v. Village of Cadiz*, 61 O. S. 494.

**Sec. 1828 R. S. [When misdemeanor may be tried by jury.]** In misdemeanors prosecuted in the name of the state he may

summon a jury and try the case notwithstanding the accused has a right to a jury which he has not waived, if a request for such trial subscribed by the accused is filed in the case, before the commencement of the trial; provided, that in villages situated in counties containing a city of the first grade of the first class such request by the accused shall not be necessary. And in such case the trial shall be had on the affidavit in the same manner and with like effect as a trial is had on an indictment for such offense in the court of common pleas. [89 v. 362; 66 v. 169, § 114; 69 v. 192, § 117.]

**Sec. 1829 R. S. ]When he may recognize in such cases.]** If in the opinion of the mayor the public interest will thereby be promoted, he may decline to permit such trial, and having entered that fact on his docket, proceed to inquire into the complaint, and discharge the accused, recognize him to the court of common pleas or probate court, as the case may be, or commit him in default of bail. [66 v. 169, § 114; 69 v. 192, § 117.]

**Sec. 1830 R. S. [Jurisdiction in felonies, etc.]** In felonies, and other criminal proceedings not herein provided for, such mayor shall have jurisdiction and power throughout the county, concurrent with justices of the peace.<sup>1</sup> [66 v. 169, § 114; 69 v. 192, § 117.]

(1) **Jurisdiction.**— In felonies to the Court of Common Pleas or the mayor has only the powers of Probate Court. *Truman v. Walton*, an examining court and can only 59 O. S. 517, 526. discharge or recognize the accused

**Sec. 1830—1 R. S. [Defining boundary line between villages adjoining each other on opposite sides of railroad, and their separate jurisdiction.]** Whenever two villages adjoin each other on opposite sides of the line of any railroad in any county containing a city of the first grade of the first class, the boundary line between such villages, except where the same had been established previous to the passage of the act hereby repealed, shall be along the middle of the right of way of said railroad. And the boundary lines of villages affected by said act passed March 31st, 1881, are hereby changed and re-established on the lines established previous to the passage of said act. [88 v. 242; 78 v. 93.]

**Sec. 1830—2 R. S. [Jurisdiction of municipality over right of way of railroad adjoining or forming part of boundary line.]** Whenever the line of a railroad adjoins or forms a part of the boundary line of a municipal corporation, such municipal corporation shall have jurisdiction over the entire width of the right of way of the line of railroad, so adjoining or forming a part of the boundary line of such municipal corporation, for



the punishment of the violation of the ordinances of such municipal corporation. [92 v. 428.]

**Sec. 1831 R. S.** [Appointment of police justice; powers and duties.] In villages the council may, upon the recommendation of the mayor, by an affirmative vote of two-thirds of all the members elected, appoint some justice of the peace, resident of the corporation, or if there be no such justice of the peace, other suitable person resident of the corporation or a justice of the peace for the township in which such corporation is situate, police justice, who shall, during the term of office of such mayor, unless removed on suggestion of such mayor by a two-thirds vote of all the members of the council, have concurrent jurisdiction of all prosecutions for violations of ordinances of the corporation with full power to hear and determine the same, and shall have the same powers, perform the same duties, and be subject to the same responsibilities in all such cases as are prescribed in the Revised Statutes of Ohio, to be performed by and are conferred upon the mayors of such corporations. Any person so appointed police justice, other than a justice of the peace, shall take an oath of office and give bond in such sum for the faithful performance of his duties as the council may require. [98 v. 159; 95 v. 353; 93 v. 12; 89 v. 139; 69 v. 192.]

**Sec. 1832 R. S.** [Manner of signing process; his seal, powers, etc.] Such justice of the peace so appointed shall be styled "Police justice," in which style he shall sign all process and records during the time he shall serve; he shall have a seal, to be provided by the council, with the name of the state in the center, and the words, "Police justice of the village of —," around the margin; and all the provisions of this chapter applicable to the mayor of a village shall apply to such police justice. [69 v. 192, § 117.]

### (C) IN HAMLETS.<sup>1</sup>

**Sec. 1833 R. S.** [Power of president of board and justice of the peace.] A justice of the peace of a township in which a hamlet, or any part of it, may be situated, or the president of the board of trustees of such hamlet,<sup>2</sup> shall have jurisdiction in any prosecution for the violation of any ordinance of such corporation, to hear and finally determine the same, and impose the prescribed punishment, unless imprisonment is a part of the prescribed punishment. [73 v. 170, § 56.]

(1) This was subdivision 3, chap. 2, div. 5, Title XII., R. S.

(2) See note "Status of Hamlets" under § 1 of the Code.

**Sec. 1834 R. S.** [When he may finally hear and determine.] If imprisonment is a part of the prescribed punishment for such offense, the justice or president shall have jurisdiction to

hear and determine the case, and inflict the prescribed punishment, if the accused before the commencement of the trial, subscribes and files in the case a waiver of a jury. [73 v. 170, § 56.]

**Sec. 1835 R. S. [When he shall recognize, etc.]** If in the cases mentioned in the last section, the accused does not subscribe such waiver, the justice or president shall inquire into the complaint, and discharge the accused, or recognize him to appear before the court of common pleas, or commit him in default of bail, and in such case the court of common pleas shall have jurisdiction of the offense, and shall direct the prosecuting attorney to file an information against the accused, on which he shall be tried. [73 v. 170, § 56.]

**Sec. 1836 R. S. [Disposition of fines.]** Fines collected by any officer for the violation of an ordinance of a hamlet, shall be by him paid over to the clerk of the corporation, to be applied to corporation purposes. [73 v. 170, § 56.]

(D) FURTHER PROVISIONS CONCERNING THE POWERS OF THE MAYOR AND OTHER OFFICERS IN CITIES AND VILLAGES IN MATTERS OF A CRIMINAL OR POLICE NATURE.<sup>1</sup>

**Sec. 1837 R. S. [Further as to powers of mayors in cities and villages in criminal matters.]** The mayor shall have, within the corporate limits, all the powers conferred upon sheriffs to suppress disorder and keep the peace; and he shall award and issue all writs and process that may be necessary to enforce the administration of justice throughout the corporation, and for the lawful exercise of his jurisdiction, according to the usages and principles of law; he shall subscribe his name and affix his official seal to all writs, process, transcripts, and other official papers; and, in cities having no police judge, in the absence or during the disability of the mayor, he may designate a justice of the peace to perform his duties in criminal matters, which justice shall, during the time, have the same power and authority as the mayor.<sup>2</sup> [66 v. 169, § 118.]

(1) This was subdivision 4, chap. 2, div. 5, Title XII., R. S. § 1843 R. S. omitted here, is incorporated in § 200 of the Code, page 451.

(2) **Liability of mayor.**— When a person is arrested on a warrant for violating an ordinance subsequently held invalid, the mayor

is not liable in an action for false imprisonment. *Wheeler v. Gavin*, 5 C. C. 246.

But he is liable when he does not keep within his prescribed jurisdiction. *Truesdell v. Combs*, 33 O. S. 186; *Truman v. Walton*, 59 O. S. 517.

**Sec. 1838 R. S.** [Proclamation as to sale of liquors on election day.] The mayor shall, three days previous to and on the day of any election, issue a proclamation to the public, setting forth therein the substance of the enactments to prohibit the sale of intoxicating liquors on that day; and it shall be the duty of the mayor to take proper measures for the enforcement of such enactments. [61 v. 24, § 1; S. & S. 344.]

**Sec. 1839 R. S.** [Ordinances as to juries; qualification of jurors, etc.] The council of any city or village shall have power to prescribe by ordinance for summoning and impaneling juries under this division; and the jurors so summoned shall have the qualifications of jurors in the court of common pleas, and may be impaneled to try any case which, by the constitution, or the provisions of this division, is triable by jury. [66 v. 180, § 194.]

**Sec. 1840 R. S.** [Talesmen.] When any juror so summoned, upon challenge or inquiry, is found incompetent, he may be dismissed, and a talesman called by the marshal, or other officer attending the trial, and the panel shall be filled in the same manner as panels are filled in the court of common pleas. [66 v. 180, § 195.]

**Sec. 1841 R. S.** [Penalties, etc., of jurors; fees of jurors and witnesses.] Jurors so summoned shall perform like duties, and be subject to like rules and penalties, as jurors before justices of the peace; and witnesses and jurors shall, except as herein otherwise provided, receive the same compensation as witnesses before justices of the peace. [66 v. 180, § 196.]

**Sec. 1842 R. S.** [How fees paid.] In cases for the violation of ordinances, the fees of witnesses and jurors shall be paid, on the certificate of the officer presiding at the trial, out of the corporation treasury, and in state cases on like certificate out of the county treasury.<sup>1</sup> [66 v. 180, § 196.]

(1) § 1843 R. S., omitted here,  
is re-enacted in § 200 of the Code,  
page 451.

**Sec. 1844 R. S.** [Contempt; rules.] The officer presiding at any such trial shall have like power to punish contempts, and compel the attendance of jurors and witnesses, and to establish rules for the examination and trial of all cases brought before him, as is or may be conferred on justices of the peace. [66 v. 180, § 198.]

**Sec. 1845 R. S.** [Supervision of prison, etc.] The mayor, and in his absence, the president of the council, shall have power to grant to magistrates of adjoining or contiguous townships



the temporary use of the corporation prison, station or watch-houses, to confine criminals, or other persons dangerous to the peace of the community, until they can be safely removed therefrom to the county jail, or other place of security. [66 v. 170, § 120.]

**Sec. 1846 R. S.** [When offender may be confined until fine and costs paid.] When a fine is the whole or part of a sentence, the court, mayor, or president of the board of trustees, may order that the person sentenced shall remain confined in the county jail, work house, or prison, until the fine and costs be paid, or secured to be paid, or the offender be otherwise legally discharged.<sup>1</sup> [66 v. 314, § 180; 60 v. 66, § 1; S. & S. 610.]

(1) **When mayor not entitled to costs.**—When a person works out his fine and costs, at a city workhouse, the city is not liable to the mayor for his costs. Gibson v. Zanesville, 31 O. S. 184.

Legislature has by law authorized execution against the person in a criminal case only where fine is imposed as part of the penalty, except under § 6801 R. S. Luetzler v. Perry, 18 C. C. 826.

**Execution against person.**—

#### (E) JURISDICTION IN CASES OF FOOD ADULTERATION, ETC.

**Sec. 3718a R. S.** [Jurisdiction of justices, police judges and mayors in prosecutions for adulteration of food, etc., and for cruelty to animals or children.] Any justice of the peace, police judge, or mayor of any city or village, shall each have jurisdiction within his county,<sup>1</sup> in all cases of violation of the laws to prevent the adulteration of food and drink, the adulteration or deception in the sale of dairy products, or any other foods, and drugs and medicines, and any violation of the law for the prevention of cruelty to animals or children, or under § 3140-2, 4364-24, 4364-25, 6984, 6984a of the Revised Statutes of Ohio.

[Judicial proceedings in such cases before justices.] In any such prosecution where imprisonment may be a part of the punishment, if a trial by jury be not waived,<sup>2</sup> the said justice of the peace shall, not less than three nor more than five days before the time fixed for trial, certify to the clerk of the court of common pleas of his county that such prosecution is pending before him. Thereupon said clerk shall proceed to draw, in the presence of representatives of both parties, from the jury wheel or box containing the names of persons selected to serve as petit jurors in the court of common pleas in said county, twenty ballots or names, which shall be drawn and counted in the same manner as for jurors in said court of common pleas. Said clerk shall forthwith certify the names so drawn to said justice of the

peace, who, upon receipt thereof, shall issue to any constable of the county a venire containing such names to serve as jurors to try such case and make due return thereof. The jurors shall be subject to the same challenges as jurors are subject to in criminal cases, except capital cases, in the court of common pleas. If the venire of twenty names be exhausted without obtaining the required number to fill the panel, the justice shall fill the panel with talesmen in the manner provided for criminal cases in said court of common pleas.

**[Costs.]** In all cases prosecuted under the provisions of this act, no costs shall be required to be advanced or be secured by any person or persons authorized under the law to prosecute such case, and if the defendant be acquitted or discharged from custody, be nolle or otherwise, or if he be convicted and committed in default of paying fine and costs, all costs of such case shall be certified by said justice of the peace under oath to the county auditor, who, after correcting any errors in the same, shall issue a warrant on the county treasury, in favor of the person or persons to whom such costs and fees shall be paid.

**[Attorney in prosecuting for cruelty to animals or children.]** And in cases brought for any violation of law for the prevention of cruelty to animals or children, or under § 3140-2, 6984, 6984a or (7017-3) Revised Statutes of Ohio, any humane society or their agents may employ an attorney to prosecute the same, who shall be paid for his services out of the county treasury in such sum as any judge of the court of common pleas or probate judge, within said county, or the county commissioners, may approve as just and reasonable.

**[Jurisdiction and power of constable in such cases; fees.]** In pursuing or arresting any defendant and in subpoenaing the witnesses, the jurisdiction and powers of the constable or other court officer acting in such capacity, in all such cases, shall be the same as that of the sheriff of the county in criminal cases in the common pleas court, and he shall receive the same fees therefor as are allowed said sheriff.

**[Fees of jurors and witnesses.]** Jurors in all such cases and witnesses subpoenaed in all such cases shall be entitled to like mileage and fees, as are allowed in criminal cases in the court of common pleas, and in all other respects, in so far as the same may be applicable, the procedure provided for in criminal cases in the common pleas court not otherwise inconsistent herewith, shall be followed.

**[Affidavit; what to contain.]** And provided further, that where, in any such laws, after the first offense, a different punishment is provided for subsequent offenses, the information or

affidavit, in order to avail the state of the benefit of such additional punishment, shall so charge that it is the second or subsequent offense, and unless such special charge is so made, the punishment shall in all cases be as of the first offense. All costs and moneys which are to be paid by the county treasurer as herein provided, shall be paid out of the general revenue fund of said county.

[**New trial.**] And in any case prosecuted under the provisions of this section, a new trial, after a verdict of conviction, may be granted, for any of the reasons enumerated in section seventy-three hundred and fifty of the Revised Statutes, upon the written application of the defendant, filed within three days after the rendition of the verdict; provided that the causes enumerated in subdivision two, three and five of said section must be sustained by affidavits or other evidence showing their truth and may be controverted by like evidence. [May 10, 1902, 95 v. 517; 94 v. 92; 91 v. 412; 90 v. 335; 85 v. 144; 81 v. 181.]

(1) **Jurisdiction.** — Under this section prior to the last amendment see *State v. Peters*, 67 O. S. 494.

Jurisdiction given to justices by this section does not give them jurisdiction of violations of § 6957 R. S. *Marvin v. State*, 5 N. P. 209.

Mandamus will lie to compel exercise of jurisdiction. *State ex rel. v. Smith*, 69 O. S. 196.

(2) **Jury trial.** — Unless affidavit charges the particular case to be a second offense, imprisonment cannot be imposed and accused may be tried before mayor or justice, without a jury. *State ex rel. v. Smith*, 69 O. S. 196; see *Peters v. State*, 8 N. P. 595; 67 O. S. 494.

Waiver of jury need not be in writing; *Martindale v. State*, 2 C. C. 2.

### 3. FINES AND IMPRISONMENT.<sup>1</sup>

**Sec. 1864 R. S.** [**How fines, etc., recovered.**] Fines, penalties, and forfeitures may, in all cases, and in addition to any other mode provided, be recovered by suit or action before any justice of the peace, or other court of competent jurisdiction, in the name of the proper municipal corporation, and for its use; and in any suit or action where pleading is necessary, it shall be sufficient if the petition set forth generally the amount claimed to be due in respect of the violation of the by-law or ordinance, referring to its title, and the date of its adoption or passage, and showing, as near as may be practicable, the true time of the alleged violation. [66 v. 167, § 108; (S. & C. 1507).]

(1) Sections under this heading and 1863 of that chapter are repealed. The rest are contained Title XII., R. S. §§ 1861, 1862 herein.

**Sec. 1865 R. S.** [**Suits must be commenced within one year.**] Suits or prosecutions for the recovery of fines, penalties, or for-



feitures, or for the commission of any offense made punishable by any by-law or ordinance of any municipal corporation, shall be commenced within one year after the violation of the ordinance, or commission of the offense, and not afterward. [66 v. 167, § 109; (S. & C. 1507).]

**Sec. 1866 R. S. [Party to be committed in default of payment.]** When a fine is imposed for the violation of an ordinance of the corporation, and the same is not paid, the party convicted shall, by order of the mayor, or other proper authority, or on process issued for the purpose, be committed until such fine and the costs of prosecution are paid, or the party is discharged by due process of law.<sup>1</sup> [66 v. 168, § 110; (S. & C. 1553).]

(1) **Constitutional.**—Where act authorized the arrest on execution of person against whom a fine has been adjudged, imprisonment until fine is paid is not unconstitutional. *In re Beall*, 26 O. S. 195.

But a court cannot impose a fine and order commitment until fine is

paid, unless the statute so provides. *Lougee v. State*, 11 O. 68.

Under a statute such as this, it was held a fine might be collected either by commitment of person or execution against his chattels. *Huddleson v. Ruffin*, 6 O. S. 604.

**Sec. 1867 R. S. [Imprisonment, where to be made.]** Imprisonment under the ordinances of a municipal corporation shall be in the work-house or other jail of the corporation, if the corporation is provided with such work-house or a jail; and any corporation not provided with a work-house, or other jail, shall be allowed, for the purpose of imprisonment, the use of the jail of the county, at the expense of the corporation, until such corporation is provided with a prison, house of correction, or work-house; and all persons so imprisoned in the county jail shall be under the charge of the sheriff of the county, who shall receive and hold such persons in such manner as may be prescribed by the ordinances of the corporation, until discharged by due course of law. [66 v. 168, § 111; (S. & C. 1554).]

**Sec. 1868 R. S. [Imprisonment in county jail may be prohibited.]** The county commissioners may, at their discretion, on giving ninety days' written notice to the council of any corporation, prohibit the use of the county jail for the purpose authorized in this chapter. [66 v. 168, § 112; (S. & C. 1554).]

**Sec. 1869 R. S. [Limit of such prohibition.]** If, within ninety days after such notice is given, the council of such corporation efficiently provide, by the passage of appropriate ordinances, and the making of the necessary contracts for the immediate erection of a prison, work-house, or house of correction, the corporation shall continue, notwithstanding the

notice and prohibition provided for in the preceding section, to have the use of the county jail for the purpose of imprisonment, until such prison, workhouse, or house of correction is erected and ready for use. [66 v. 168, § 113; (S. & C. 1554).]

#### 4. BILLS OF EXCEPTIONS.

**Sec. 6565 R. S.** [Bills of exceptions on trial before justice, mayor or police judge; how exceptions taken; signing, filing and transmission to clerk of courts.] In all cases before a justice of the peace, mayor or police judge, whether tried by jury or the justice, mayor or police judge, either party shall have the right to except to the decisions of the justice, mayor or police judge, upon any matters of law arising in the case. The party objecting to the decision must except at the time the decision is made and time shall be given to reduce the exception to writing, but not more than ten days nor less than five days beyond the date of overruling the motion for a new trial, if such motion be made, or from the date on which the decision of the justice, mayor or police judge, is rendered; when the decision objected to is entered on the record and the grounds of the objection appear in the entry, the exception may be taken by the party causing same to be noted at the end of the entry, that he excepts, but when the decision is not entered on the record or the grounds of the objection do not sufficiently appear in the entry, or exception is to the decision of the court on a motion to direct a nonsuit, or to arrest the testimony from the jury, or for a new trial, because the verdict, or if a jury is waived the finding of the court is against the law and the evidence, or on the admission or rejection of evidence, the party excepting must reduce this exception to writing and present the same to the trial justice, mayor or police judge, or his successor, within the time herein limited, and if the same is correct he shall sign said bill of exceptions and file the same with the papers in the case, and note such signing and filing in his docket, and transmit the same with the transcript of his docket and original papers, within ten days of the date of such signing, to the clerk of the court of common pleas and by him filed and entered upon his trial docket as in other cases. The party demanding such transcript shall, if required, pay the fees of the justice, mayor or police judge, therefor in advance.<sup>1</sup> [April 10, 1902; 95 v. 121; 93 v. 104; 90 v. 358; 80 v. 79, 81; Rev. Stat. 1880; 66 v. 7, § 93; (S. & C. 786).]

**Review** of judgment of mayor see *Whitman v. State*, 7 C. C. (N. upon issue raised by plea in bar, S.) 334.

## III

BOARD OF HEALTH.<sup>1</sup>

**Sec. 2117 R. S. [Township board of health; duties and powers; organization.]** In each township the trustees of the township shall constitute a board of health, which shall be for the township outside the limits of any city or village, and such boards shall have the same duties and powers as are herein imposed or granted to boards of health in cities and villages. They shall annually elect one of their number president, and the township clerk shall be clerk of the board of health; they shall appoint a health officer and may appoint as many sanitary officers as they deem necessary to carry out the provisions of this act, and define their duties and fix their compensation, and such appointees shall serve during the pleasure of the board. Township boards of health shall meet annually and at such other times as they may deem necessary. [1902, May 7: 95 v. 424.]

(1) **Board of health statutes.**  
— For history of sections and explanations of those carried in Parts I. and II., see note 1 to § 187 of the Code, page 418.

**Board of Health under new Code,** in cities and villages; see § 187 *et seq.* of the Code, page 417.

**Sec. 2122—1 R. S. [Garbage crematory in Columbus.]** The boards of health of cities of the first grade of the second class be and they are hereby authorized to erect and maintain garbage crematories or furnaces and to contract for a period not exceeding ten years for the removal and disposition of garbage, dead animals and animal offal, and the councils of such cities, in addition to taxation authorized to be levied for other purposes, be and they are hereby authorized to levy upon each dollar of the taxable property of said cities, as the same is listed for taxation upon the grand duplicate, two-fifths of a mill a year for one year, in order to raise money to build, equip and maintain a garbage crematory or furnace. Said tax shall be collected as are other taxes, and money arising therefrom shall constitute a separate fund to be called the "garbage furnace



fund," and shall be applied solely to the purposes for which it is raised. [89 v. 310.]

**Sec. 2131a. R. S. [Appointment of sanitary police in Cleveland; specials; powers, duties and salaries; removal of police now in office.]** In all cities of the second grade of the first class, the board of health shall have power to appoint as many persons for sanitary duty as in its opinion the public health and sanitary condition of the corporation may require, not exceeding one for each ten thousand inhabitants, as shown by the last police census in such cities; but the board shall have the power in cases of emergency, to appoint as many special sanitary police as it may think proper, and such appointees as special police shall serve during the pleasure of the board; and all such persons shall have general police powers, be known as sanitary police, shall be electors of such cities and perform such duties as the board of health may direct; and for such services shall receive a salary, fixed by the board, of not less than seven hundred and eighty dollars per annum. Provided that the sanitary police now in office shall not be removed except in the manner provided for by section *two thousand one hundred and thirty-two (a)*. [1888, March 6: 85 v. 60; 83 v. 115.]

**Sec. 2132a R. S. [Removals and suspensions generally; rules and regulations.]** In all cities of the second grade of the first class, the board of health may, for cause to be assigned, on a public hearing, on due notice, and by the vote of a majority of all members elected, according to rules promulgated by it, remove or suspend from office, or for any definite time deprive from pay, any member of such sanitary police force or any employe of such board; and no employe of such board of health shall be dismissed for other reasons; it may make rules and regulations for the government and discipline of the employes, and cause the same to be published. [1888, March 6: 85 v. 60; 83 v. 115.]

**Sec. 2134—1 R. S. [Regulation of sale of ice for domestic purposes.]** No ice shall be cut for the purpose of being sold or used for domestic purposes in any city or village of this state from any pond, lake, creek or river within the limits of any such city or village, unless a permit therefor shall first be obtained from the board of health of such city or village, and no person or persons shall sell or deliver any ice in any city or village in this state for domestic purposes without first obtaining a permit therefor from the board of health of such city or village, and it shall be lawful for any such board of health to refuse a permit and to revoke any granted by them, as afore-

said, when in their judgment the use of any ice cut or sold, or to be cut or sold, for domestic purposes, under the same is or would be detrimental to the public health. [1902, April 29: 95 v. 330; 94 v. 370.]

**Sec. 2134—2 R. S.** [Board of health may prohibit sale of ice for domestic purposes.] The board of health of any city or village may prohibit the sale or use of any ice for domestic purposes within the limits of such city or village when, in their judgment the same is unfit for use, and the use of the same would be detrimental to the public health and the said board may prohibit and through its officers stop, detain and prevent the bringing of any such ice for the purpose of sale or use for domestic purposes into the limits of such city or village, and also in the same manner stop, detain and prevent the sale of any such ice for domestic purposes within the limits of such city or village when, in their judgment the same is unfit for use, and the use of the same would be detrimental to the public health, and the said board may prohibit and through its officers stop, detain and prevent the bringing of any such ice for the purpose of sale or use for domestic purposes into the limits of any such city or village, and also in the same manner stop, detain and prevent the sale of any such ice for domestic purposes found within the limits of such city or village. [1902 April 29: 95 v. 330; 94 v. 370.]

**Sec. 2134—3 R. S.** [Penalty.] Whoever violates any provisions of this act, or any order or regulation of the board of health made in pursuance thereof, shall be fined in any sum not exceeding one hundred dollars. [1902, April 29: 95 v. 330; 94 v. 371.]

**Sec. 2141—1 R. S.** [Authorizing the abolition of boards in certain villages.] In all incorporated villages of this state, having at the last federal census, not more than 1,781 inhabitants located in any county containing a city of the first class, second grade, the council may upon appointment of a suitable committee from its own members to look after the sanitary affairs of the said village, by resolution concurred in by at least three-fourths of all the members elected to such council, declare the board of health of said village no longer needed and abolish the same; provided that nothing herein shall be so construed as to prevent the appointment of such board of health at any time hereafter by the said council whenever in their judgment the best interests of the municipality demand[s] it. [87 v. 376.]

**Sec. 2142a R. S.** [Definition of "sanitary plant."] The expression "sanitary plant" as herein used, shall be held to mean a structure with the necessary land and all the necessary fixtures and appliances and appurtenances required for the treatment and purification and disposal, in a sanitary manner, of either or both the liquid or solid wastes of the municipality.

**[Plans and estimates; condemnation of lands for sanitary plant.]**

Upon the recommendation of the board of health of any city, village or hamlet, or if in any municipality, the powers usually vested in a board of health, have been vested in any other officer or board, then upon the recommendation of such officer or board, the city council, legislative body or other governing board, of any municipality, is hereby authorized to cause plans and estimates to be prepared and to acquire by condemnation or otherwise such land or lands within or without its corporate limits, as may be necessary to provide for the proper disposal, in a sanitary manner, of the sewage and the garbage and waste matters, or either or any of them of the municipality, and such council, legislative body or other governing board of the municipality, is hereby authorized, upon first obtaining the approval of the state board of health, to contract for, erect and maintain a sanitary plant or plants, on the the land or lands acquired under the provisions of this act, together with all buildings, machinery, appliances and appurtenances, necessary for the disposal, in a sanitary and economic manner, of the sewage and garbage, night-soil, dead animals, offal, spoiled meats, and fish or any putrid substance, or any liquid or solid wastes, or any substance injurious to health, of the municipality. [94 v. 343, 383.]

**Sec. 2142b R.S.** [Collections, removal and disposal of garbage, night-soil, etc.] The said council, legislative body or other governing board, is hereby authorized to contract, for a period not exceeding five years for the collection and removal and disposal of such garbage, night-soil, dead animals and other solid waste substances, at the expense of such municipal corporation, or at the expense of persons responsible for the existence of such waste substance. [94 v. 343, 384.]

**Sec. 2142c R. S.** [How funds raised for such purpose.] For the purpose of carrying into effect the foregoing powers, the councils of cities, legislative bodies or governing boards of any municipal corporation or township may use any funds raised, or heretofore authorized in any manner and necessary for said purposes, and in case no funds are available and no bonds have been heretofore authorized for said purposes, and it be neces-



sary to issue and sell bonds for said purposes, then the question of issuing any bonds of the municipality shall be submitted at an election conducted therefor in conformity with provisions of section 2836, except that a majority of the votes cast shall be deemed sufficient to authorize the municipal corporation to issue said bonds under this act, and the council or other legislative body shall not have authority to issue the said bonds unless a majority of the qualified electors of such municipality voting shall be in favor of the proposition to issue said bonds for said purposes. [94 v. 343, 384.]

**Sec. 2142d R. S. [Appointment of sanitary board.]** Before submitting said proposition to a vote of the people, the city council, or other legislative body of said municipal corporation may by resolution determine to have all the work in connection with the erection and maintenance of said sanitary plant and the acquisition of the necessary real estate therefor, put under the control of a sanitary board, which shall be appointed before the vote is taken.

**[Constitution of board; how appointed; term.]** Said board shall consist of two citizens from each of the two political parties casting the highest vote at the last preceding municipal election, who shall be appointed by the mayor by and with the consent and approval of the city council, or other legislative body of said municipal corporation, and shall serve for a term of two years and until their successors are duly appointed.

**[Compensation and powers of board.]** Said boards shall have such reasonable compensation as the city council or other legislative [body] of said municipal corporation may prescribe, and shall have entire control of the erection and maintenance of said sanitary plant and the purchase of the necessary real estate therefor on behalf of said municipal corporation and may, in its discretion, modify said original plans and specifications, subject however to the approval of the state board of health, and provided, that the total cost thereof shall not exceed the original estimate. [94 v. 344, 384.]

**Sec. 2142e R. S. [Levy for sanitary fund.]** For the purpose of providing a fund for the payment of the principal and interest of the bonds issued under this act, and of maintaining said sanitary plant or plants, said city council or other legislative body shall, in addition to the other levies authorized by law, levy annually a sufficient tax therefor on all the property subject to taxation in said municipal corporation and such taxes shall be levied and collected in the same manner as other taxes; and the proceeds thereof shall constitute the "sanitary fund"

of said municipal corporation, and shall be held like other funds of said municipal corporation subject only to the written order of said city council or other legislative body, or governing or sanitary board of said municipal corporation which shall have control of said work. [94 v. 344, 385.]

**Sec. 2142e—1 R. S. Sanitary board in cities second class fourth grade, may be appointed, when; Question to be submitted to voters.]** § 1. Whenever the state board of health declare it necessary for any city of the fourth grade of the second class to adopt measures for the relief and improvement of its sanitary condition, by the proper disposal of its sewage or garbage, or both, the city council of said city may, by resolution, authorize the establishment of a "sanitary board" for the purpose of constructing, operating and maintaining a "sanitary plant" for the proper disposal of the sewage or garbage, or both, of said city in the manner hereinafter provided; and the provisions of section 2142<sup>1</sup> of the Revised Statutes of Ohio shall not apply to any city which provides itself with a "sanitary plant" in accordance with the provisions of this act.

(1) **Section referred to.**—The 2142 R. S., repealed in 95 v. 421. section in the amendments in 95 v. See note (1) to § 187 of the Code, 421, numbered § 2142, does not relate to the same subject as old § page 418.

**[Question to be submitted to voters.]** Provided, however, that the within act is not to take effect or become in any way operative until the same is submitted to the qualified electors of said city of the second class of the fourth grade, at some general or special election after due notice has been given as provided by law and a majority of said electors voting on said proposition voting in favor of same. [94 v. 71.]

**Sec. 2142e—2 R. S. [Duties, etc., of sanitary board.] § 2. Part 1.** The sanitary board shall consist of four electors who shall be citizens of said city, two of whom shall be chosen from each of the two political parties casting the largest number of votes at the last preceding municipal election; they shall be appointed by the mayor, by and with the consent of the city council and shall serve for such compensation as the city council may allow, which shall be not less than twenty-five dollars (\$25.00) nor more than one hundred dollars (\$100.00) each per annum; their term of office shall be two years, except that the mayor may designate two of the first appointees to serve for one year only.

**Part 2. [Board to adopt plan.]** Said board shall prepare and adopt plans for the disposal of the sewage or garbage, or both, of said city, and procure the approval thereof by the state board of health.

**Part 3. [Approval of city council.]** Said plan shall thereupon be reported to the city council of said city with estimated cost of executing the same, and when approved by the city council, shall thereupon be certified back to said sanitary board, who shall thereafter have exclusive control of the erection and maintenance of said sanitary plant on behalf of the said city.

**Part 4. [Where council has prepared plans previous to appointment of sanitary board.]** Provided, however, that in case the city council of any such city shall have had the plans for a sanitary plant prepared, and approved by the state board of health prior to the appointment of a sanitary board as provided in this act, the sanitary board thereafter appointed may, upon notice and request from the city council, proceed to carry said plans into execution as hereinafter provided, and shall have entire charge and control thereof the same as if prepared by it; and out of the sanitary construction fund the sanitary board shall refund to the city any and all expense incurred by the city in procuring and perfecting said plans.

**Part 5. [Board shall advertise for bids.]** When said plans have been adopted or approved by the city council as heretofore provided, the said sanitary board shall at once proceed to advertise for bids and execute contracts in the name of the city for which the work, subject to the same regulations and restrictions as provided in section 2303 <sup>1</sup> of the Revised Statutes of Ohio, provided that the sanitary board shall have the entire control of the advertising for bids and letting of all contracts, instead of the various city officers named in said section 2303; provided, however, that the said sanitary board may, by and with the consent of the city council of said city, after it has duly advertised for bids for any part of said plant and has failed to receive any reasonable and satisfactory bid therefor, proceed to buy the necessary materials and construct any such part or parts of said sanitary plant under the immediate supervision of its engineer and managing officers.

(1) § 2303 R. S. repealed by the see note (1) to § 143 of the Code, Code. See § 50 *et seq.* of Code; and page 371.

**Part. 6. [Powers.]** Said sanitary board may, in order to carry out the provisions of this act, employ officers and the requisite expert and professional assistants, purchase materials,



employ laborers, erect buildings, purchase and lease real estate in the name of said city, either within or without its corporate limits, and if necessary, to appropriate the same, it shall proceed in the manner and form provided in chapter three, division seven, title twelve of the Revised Statutes of Ohio.<sup>1</sup>

(1) This chapter is now superseded by §§ 10 to 22 of the Code.

**Part 7. [Money shall be paid out only on orders.]** No money shall be paid out of the sanitary fund of said city except upon the written order of the sanitary board, signed by its president and attested by its secretary or clerk.

**Part 8. [Quarterly report to council.]** Said sanitary board shall keep a record of all its meetings and of all orders issued on the sanitary funds of said city; a report of its receipts and expenditures shall be made to council every three months, or as often as required by council; the "aye" and "nay" vote shall be taken and recorded on every resolution involving the expenditure of money or entering into a contract. [94 v. 72.]

**Sec. 2142e—3 R. S. [Change of watercourses.] § 3.** The sanitary board of said city is authorized if, in their judgment, it becomes necessary so to do in the interest of the health of said city, and the operation of a sanitary plant, to change the channel of any unnavigable watercourse outside, as well as inside, the corporate limits of said city, by deepening, widening and straightening the same, and removing or altering any and all dams or other obstructions in said channel; provided, that in making this improvement, they first procure the approval of the plans by the state board of health and then proceed in the manner prescribed by section 2304<sup>1</sup> of the Revised Statutes of Ohio, regulating the procedure of city councils in making public improvements within their respective cities;

(1) § 2304 R. S. repealed by new Code. See § 50 *et seq.* of Code.

**[Claims for damages.]** and all claims for damages against said municipal corporation growing out of said proposed improvement shall be filed and the rights of all parties determined by the city council as provided in subdivision 2 of chapter 4, division 7, title 12 of the Revised Statutes of Ohio;<sup>1</sup> provided, however, that immediately upon the filing of any such claim with the city clerk, the same shall be certified by him to the sanitary board and if the same shall not have been settled and discharged by the said sanitary board within sixty days from the date of filing, it shall be returned to said city clerk:

and acted upon by said council of said city like other claims for damages arising out of improvements in said city; and any judgment recovered against said city on any such claim shall be paid out of the sanitary construction fund of said city, and the said sanitary board may, upon its written request to the city council of said city, take entire control and supervision of litigation growing out of said claims; and no suit shall be brought against the city on [any] such claim until one hundred and twenty (120) days shall have elapsed from the filing thereof. [94 v. 73.]

(1) See §§ 54 to 58 inclusive, and § 94 of the Code.

**Sec. 2142e—4 R. S.** [To sell bonds, etc.] § 4. The city council of any city which has approved the plans for a sanitary plant as provided in section 2 of this act, or the changing [of] the channel or removal of obstructions in any watercourse as provided in section 3 of this act, is hereby authorized to, and must, upon the written request of the sanitary board, proceed to issue and sell bonds of said city in the amount so requested by said sanitary board from time to time, as the work progresses, which shall not, in the aggregate, exceed the estimated cost of the said sanitary plant, and change or removal of obstructions from any watercourse, which bonds shall be entitled "sanitary construction bonds" and shall bear interest not exceeding six per cent. per annum, payable semi-annually, and of denominations of not more than one thousand dollars (\$1,000.00) nor less than one hundred dollars (\$100.00) each, made payable at such times as said council may, by resolution, prescribe, but not to exceed fifteen (15) years from date of issue. Said bonds shall not be sold for less than par, and the proceeds thereof shall be paid to the city treasurer and shall constitute a special fund to be known as the "sanitary construction fund," which shall be subject only to the orders of the sanitary board and shall be used for the purpose of acquiring the necessary real estate and constructing a sanitary plant with its appurtenances as provided by this act.

Said sanitary boards shall conform to the requirements of chapter 2, division 9, title 12 of the Revised Statutes of Ohio,<sup>1</sup> except as the provisions of said chapter have been modified in this section. [94 v. 74.]

(1) **Chapter referred to.**—§§ 2701, 2703, 2706, 2707, 2708 are re-enacted in § 96 of Code. § 2709 as amended (95 v. 507) is not repealed; the remainder of chapter

2, referred to, is repealed by the Code. See §§ 95 to 100, inclusive, of the Code, for present provisions on the subject.

**Sec. 2142e—5 R. S. [Sanitary extension.]** § 5. Whenever it is deemed necessary by the state board of health and the sanitary board of any such city which has built a sanitary plant or changed a channel on account of obstructions in any water-course, and appointed a sanitary board under the provisions of this act, to enlarge or extend the sanitary plant to provide for the increased demands of said city, the sanitary board may prepare plans for the same, which, when approved by the state board of health, shall be submitted to the city council, together with an estimate of the cost of executing the same, and the same proceedings shall be had thereon as are herein provided in sections 2, 3 and 5 of this act, for the original construction of a sanitary plant and subject to the same control by the sanitary board of said city, except that the fund arising from the sale of the bonds to enlarge or extend a sanitary plant, shall be denominated "sanitary extension fund" and shall be used for no other purpose; and the bonds sold to raise said fund shall be denominated "sanitary extension bonds;" provided, however, no sanitary extension bonds shall be sold by any such city until at least five years have elapsed since the last preceding "sanitary bonds" have been issued and sold. [94 v. 74.]

**Sec. 2142e—6 R. S. [The tax.]** § 6. For the purpose of providing a fund for the payment of the principal of said sanitary construction bonds and sanitary extension bonds respectively, at maturity, and of paying the interest on said bonds, said council shall, in addition to the other levies authorized by law, levy annually a sufficient tax on all the property subject to taxation in said city, and such taxes shall be levied and collected in the same manner as other taxes; and the proceeds thereof shall constitute the "sanitary construction fund" and the "sanitary extension fund" respectively, of said city, and shall be held by the city treasurer like other city funds, subject only to the written order of the sanitary board of said city, as hereinbefore provided. [94 v. 75.]

**Sec. 2142e—7 R. S. [Maintenance.]** § 7. For the operation, repair and maintenance of said plant, erected under the provisions of sections 2 and 3 of this act, the city council of said city is hereby authorized and directed to levy a tax, annually, not exceeding one-half mill per annum, on every dollar of taxable property, both real and personal, listed for taxation in said city, in addition to the amount otherwise authorized by law, to be collected like other taxes, and to be used for no other purpose; the proceeds of said tax shall constitute the "sanitary





maintenance fund" and shall be held by the city treasurer like other city funds, subject only to the written order of the sanitary board of said city. In order to determine the amount of said levy, the sanitary board of said city shall, on or before the first day of April of each year, submit to the city council, in writing, an estimate of the probable expenses of operating, repairing and maintaining said sanitary plant for one year, and said city council shall thereupon levy a sufficient tax to produce said funds, subject to the limitations hereinbefore contained. [94 v. 75.]

An act to provide for the cost of collecting, removing and disposing of garbage, dead animals and animal offal where provision could not be made therefor.

[Sec. 1.] ["Garbage bonds;" when municipality may issue; tax levy.] In any municipality which has heretofore entered into any contract for the collection, removal and disposal of garbage, dead animals, and animal offal, after the date fixed for making provision for the expenditures arising thereunder during the year in which any such contract goes into operation, and where such provision was not in fact made, the board of public service, if there be such a board, or its successor, and if there be no such board, the council or trustees of any such municipality, is hereby authorized to issue bonds in the name of such municipality, in an aggregate amount not exceeding thirty-seven thousand three hundred and fifty dollars, to meet the expenditures estimated to be incurred under such contract, during the year for which no provision was made as aforesaid. In anticipation of the funds arising from the sale of such bonds, it shall be lawful for any such municipality, by its proper officer and boards to make an estimate of the money needed to meet its obligations, arising under such contract, for such year or part thereof, and to provide for their payment, in the manner prescribed by law, out of the proceeds arising from the sale of any such bonds. Said bonds shall be of such denomination as the issuing board may determine, be made payable in not less than twenty years nor more than thirty years from the date of their issue, and shall bear interest at a rate not exceeding  $3\frac{1}{2}$  per cent. per annum, and they shall be designated as "garbage bonds." They shall be signed, sealed and sold in the manner and subject to the conditions prescribed by law, and shall be secured by the pledge of the faith of the municipality and a tax, which it is hereby made the duty of its legislative board to levy, annually, upon all the taxable property within the municipality, sufficient in amount to pay the interest of the bonds annually, and to

provide a sinking fund to redeem them at maturity, and such tax may be in addition to the amount now authorized by law to be levied for municipal purposes. In municipalities which have a board designated as the trustees of the sinking fund, the rate of tax to be levied as above, shall be fixed and certified by such board. [May 10, 1902, 95 v. 477.]

**Sec. 409—26 R. S. [Powers of Cincinnati board of administration as to sewerage.]** In cities of the first grade of the first class, the duly constituted authorities, as provided by law, shall have authority and control in introducing a system of sewerage, and in locating, constructing and extending all sewers within the limits of any such city, whether the same be for general sewerage or for surface water only, and for such purpose may condemn the necessary right for an outlet or extension of sewers beyond the limits of the city; and whenever any sewer or system of sewers has an outlet into any stream, above the intake of any water works system, drawing water from such stream, the board of administration of such cities shall have power and authority to prohibit any connection with such sewer or system of sewers, for any other purpose than for draining surface water therein; provided, however, that nothing in this act shall be held to abridge or in any way to interfere with the authority now vested by law in the state board of health. [92 v. 759.]

**Sec. 409—28 R. S. [Local reports to state board of existence of contagious or infectious diseases; in case of epidemic, sanitary officer may be appointed to enforce orders.]** It shall be the duty of the boards of health, health authorities or officials, and of physicians in localities where there are no health authorities or officials, to report to the state board of health, promptly upon the discovery thereof, the existence of any one of the following diseases which may come under their observation, to-wit:

Asiatic cholera, yellow fever, smallpox, scarlet fever, diphtheria, membranous croup, typhus or typhoid fever, and of such other contagious or infectious diseases as the state board of health may from time to time specify. And when any contagious or infectious disease shall become or threaten to become epidemic in any city, village, hamlet or township, and the local authorities shall neglect or refuse to enforce efficient measures for its prevention, the state board of health, or the secretary as its executive officer, on the order of the president of said board, may appoint a medical or sanitary officer and such assistants as he may require, and authorize him to enforce such orders or regulations as said board or its executive officer may deem necessary. [1902, May 7: 95 v. 421.]

[An act to provide for annual conferences of health officers.]

[Sec. 1.] [Provision for annual conferences of health officers.] That the state board of health may make suitable provision for annual conferences of health officers and representatives of local boards of health for the consideration of the cause and prevention of dangerous communicable diseases and of other measures to protect and improve the public health. And it shall be the duty of the board of health or other body or person appointed or acting in lieu of a board of health to appoint one delegate to such annual conferences, and the actual necessary expenses of such delegate in attendance at such meetings shall be provided for and paid by the city, village or township which he is appointed to represent, provided he procures a certificate from the secretary of the state board of health that he was in actual attendance at the sessions of such conferences.

The state board of health may provide for one annual conference of representatives of city boards of health, another for representatives of village boards of health, and one or more for representatives of township boards of health, or make such other division of conferences as it may deem best, but no meeting shall continue longer than three consecutive days and no board of health shall be required or authorized to send a delegate to more than one conference in any one year. [1906, April 16, 98 v. 205.]

**Sec. 6923 R. S. [Unlawful deposit of dead animals, offal, etc., in or upon land or water.]** Whoever puts the carcass of any dead animal, or the offal from any slaughter house, or butcher's establishment, packing house, or fish house, or any spoiled meat, or spoiled fish, or any putrid substance, or the contents of any privy vaults, upon or into any lake, river, bay, creek, pond, canal, road, street, alley, lot, field, meadow, public ground, market space or common, and whoever being the owner or occupant of any such place, knowingly permits any such thing to remain therein, to the annoyance of any of the citizens of this state, neglects or refuses to remove or abate the nuisance occasioned thereby, within twenty-four hours after knowledge of the existence of such nuisance upon any of the above described premises, owned or occupied by him, or after notice thereof in writing, from any road superintendent, constable, trustee, or health officer of any municipal corporation or township in which such nuisance exists, or from a county commissioner of such county, shall be fined not



more than fifty dollars nor less than ten dollars, and pay the cost of prosecution, and in default of the payment of said fine and cost, be imprisoned not more than thirty days, but the provisions hereinbefore made shall not prohibit the depositing of the contents of privy vaults and catch basins into trenches or pits not less than three (3) feet deep, excavated in any lot, field or meadow, the owner thereof consenting, outside the limits of any municipal corporation, and not less than thirty rods distant from any dwelling, well or spring of water, lake, bay or pond, canal, run, creek, brook or stream of water, public road or highway; provided, that said contents deposited in said trenches or pits are immediately thereafter covered with dry earth to the depth of at least twelve inches; nor shall said provisions prohibit the depositing of said contents into furrows situate and distinct, as specified for said trenches or pits; provided, the same are immediately thereafter wholly covered with dry earth by plowing or otherwise; and, provided, also, that the owner or occupant of the land in which said furrows are plowed consents, and is a party thereto; provided, also, that the board of health of any municipal corporation may allow said contents to be deposited within corporate limits into trenches or pits or furrows, situate, distant and to be covered as aforesaid.

[**Dayton.**] Provided, further, that in cities of the second grade of the second class having and maintaining a crematory, the contents of privy vaults in said cities and towns shall be deposited at said crematory, and whoever shall haul away and deposit the contents of any such privy vault, in any such municipal corporation, at any other place than at such crematory, shall be fined not more than fifty dollars nor less than ten dollars, and pay the cost of prosecution, and in default of the payment of said fine and costs, be imprisoned not more than thirty days. [1906, April 16, 98 v. 329; 93 v. 298; 87 v. 349; 85 v. 268; 63 v. 102; 30 v. 22.]

## IV

CHARITABLE AND REFORMATORY  
INSTITUTIONS; SOLDIERS' RELIEF.

## 1. GENERAL PROVISIONS.

**Sec. 633—11 R. S.** [All institutions open to inspection of county commissioners or board of health.] Every private or public hospital, reformatory home, house of detention, private asylum, and any institution exercising or pretending to exercise a reformatory or correctional influence over individuals in the state of Ohio, shall be open at any and all times for the inspection of the commissioners of the county in which any such institution is situated, or the board of health of the township, or other municipality in which any such institution is situated. [92 v. 212.]

**Sec. 633—14 R. S.** [Penalty for denying or obstructing investigations.] Any official, agent, or employe, or other person refusing to permit or in any manner interfering with the inspection of any such public or private hospital, reformatory home, house of detention, private asylum, or any institution exercising or pretending to exercise a reformatory or correctional influence over individuals, by the county commissioners of the county in which such institution, or institutions, are situated, or by the board of health, of the municipality in which the same is situated, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof, be punished by a fine of not less than twenty-five (25) dollars, or six months' imprisonment, or both, and for each subsequent offense a fine of not less than one hundred (100) dollars, and six months' imprisonment. [92 v. 212.]

**Sec. 633—15 R. S.** [Board of county visitors; appointment, qualifications, term, compensation, vacancies.] The judge of probate court in all counties shall between the first day of March and the first day of April appoint six persons, three of whom shall be women, and not more than three of whom shall have the same political affiliations, two of whom, as indicated by the appointing judge, upon the fixed appointment, shall serve for one year, two for two years, and two for three years, beginning the first day of May, who shall constitute a board of county visitors for the inspection of all charitable

and correctional institutions supported in whole or in part from the county or municipal funds. All vacancies in the board, whether occasioned by expiration of term, removal or otherwise, shall be filled in the manner that the original appointment is made and, when occurring at any time before the expiration of the term of appointment, shall be for the balance of the term only. A certificate of appointment shall be issued to all persons appointed and a copy, giving full names and addresses, shall be sent to the board of state charities at Columbus. No person shall be qualified to serve on this board who is in any manner officially connected with any charitable or correctional institution within the county supported wholly or partly at public expense. Said board of county visitors shall serve without compensation, but actual expenses incurred in the discharge of its duties and actual necessary expense incurred by any member or members to be selected by said board in visiting any other charitable or correctional institution for the purpose of information and attendance upon any convention or meeting held within the state of Ohio in the interest of and to deliberate upon charitable or correctional methods and work to an amount not exceeding one hundred dollars (\$100.00) per annum shall be allowed by the county commissioners, and the county auditor shall issue a warrant for the amount which shall be paid by the county treasurer, provided that the judge of the probate court has issued a certificate that the members of the board have satisfactorily performed their duties as provided in subsequent sections. [98 v. 28; 94 v. 70; 93 v. 57; 89 v. 161; 79 v. 107.]

**Sec. 633—16 R. S. [Duties of board of visitors.]** It shall be the duty of such board of visitors, by personal visitation or otherwise, to keep themselves fully advised of the condition and management of all charitable or corrective institutions supported in whole or in part by county or municipal taxation, or which are under county or municipal control, and especially the infirmary, county jail, municipal prisons, and children's home; and from time to time they shall recommend to the county commissioners and to other officials responsible therefor such changes and additional provisions as they may deem essential for their economical and efficient administration, and at least once in every three months all of said institutions shall be visited by said board, or a committee of its members. Failure in the performance of these duties on the part of any member of this board for one year shall be sufficient cause for his or her removal by the judge of the probate court. [98 v. 28; 79 v. 107.]

**Sec. 656 R. S. [Powers and duties of board of state charities; governor may order investigation by board.]<sup>1</sup>** The board of state charities shall be provided with a suitable room in the state house. Regular meetings of the board shall be held quar-



terly, or oftener if required. They may make such rules and orders for the regulation for their own proceedings as they may deem necessary. They shall investigate the whole system of public charities and correctional institutions of the state, examine into the condition and management thereof, especially of municipal and state prisons and reformatories, workhouses, jails, infirmaries, children's homes and state institutions, and the officers in charge of all such institutions and those who are in any way responsible for the administration of public funds used for the relief or maintenance of the poor, shall furnish the board or its secretary such information and statistics as they may require; and, to secure accuracy, uniformity and completeness in such statistics, the board may prescribe such forms of report and registration as they may deem necessary. All plans for new jails, workhouses, children's homes, infirmaries, state institutions and municipal lockups or prisons, and for important additions to or alterations in such existing institutions shall, before their adoption by the proper officials, be submitted to the board for criticism and approval. The governor, in his discretion, may, at any time, order an investigation by the board, or by a committee of its members, of the management of any penal, reformatory or charitable institutions of the state, and said board or committee, in making any such investigation, shall have power to send for persons and papers, and to administer oaths and affirmations; and the report of such investigation, with the testimony, shall be made to the governor, and shall be submitted by him, with his suggestions, to the General Assembly. [93 v. 105; 1880, April 15: 77 v. 227; Rev. Stat. 1880; 73 v. 165, § 2; (S. & S. 51).]

(1) **Conferences** with officers of board of charities, see § 656a R. S. benevolent, penal and reformatory (98 O. L. 29). institutions may be called by state

**Sec. 781—26 R. S.** [Certain city councils may establish homes for the friendless in certain cases; joint contribution of funds etc.] The city council of the city of the second class, situated in such county as aforesaid,<sup>1</sup> shall have the same power to establish, support and regulate, within and for such city, such a home and school as is described in the first section [§ (781—1)]<sup>2</sup> of this act; and in regard thereto, said council and the members thereof shall have the same powers, rights, and duties, and be subject to the same prohibitions and penalties, as have hereinbefore been vested in, imposed upon, and provided for the county commissioners of any county described in the said first section [§ (781—1)]; and any such city home shall be named ——— Home for the Friendless, the name of the city preceding the word home; provided, however, that in all cases where a city of the second class shall be situated within the limits of a county, described in the first section [§ (781—1)]

of this act, the city council of said city shall not proceed to establish or provide for the support of any such Home, without first communicating to the county commissioners of said county a copy of a resolution passed by said council, to the effect that said council proposes to establish or support such a home; and if within four calendar months of their receipt of said copy, said commissioners shall not make and adopt an order to the effect that they will establish or provide a county home, the aforesaid city council may proceed to establish, or adopt and support a city home. Such acts as have been hereinbefore required to be done by, through, or in connection with the county auditor, treasurer, county treasury, commissioners, journal, or other county officer, office, both, or department, in the case of a county home, shall be done through, by, or in connection with the corresponding city officer, office, both, or department, in the case of city home: provided, further, that any city of the second class situate in any such county as aforesaid, may, through its city council, acting in conjunction with the commissioners of such county, contribute to the purchase of land, erection of buildings, and support of such home, or the commissioners of such county may contribute in like manner to such home in such city; but in the event of such joint contributions and co-operation, such home shall be under the control of the county commissioners in case the county contribute more largely than the city, and said home shall be controlled by the city council in case the city make the greater expenditure in that behalf. (70 v. 277.)

(1) See § 781-1 R. S.

(2) **Home for the Friendless.**  
—§ (781-1) provides for “a home and school for the instruction,

employment, and reformation of exposed, helpless, evil-disposed or vicious women and girls” to be known as the “Home for the Friendless.”

**Sec. 781—30 R. S.** [Certain moneys shall be paid over to the home of friendless girls.] All justices of the peace, all police courts in the city of Toledo, and the courts of common pleas, and all courts of record in the county of Lucas, be authorized and required to pay over to the retreat, a home for friendless girls, in the city of Toledo, all fines and forfeitures arising from the prosecution of houses of ill-fame or prostitution, or the inmates, residents or visitors thereof in the city of Toledo. The said courts shall pay over, monthly, all sums of money so collected, taking therefor a receipt from the treasurer of said retreat, which shall be a voucher for said courts in any settlement with the city or county treasurer, for the sums thus collected by said courts. [1888, April 13: 85 v. 535; 83 v. 392.]

**Sec. 929—1 R. S.** [Counties and cities may appropriate not to exceed six thousand dollars in aid of children's homes.] In any county in the state of Ohio, where there now is or hereafter may be an incorporated "children's aid society," or "children's home," or "industrial school," or "industrial school and home," or any other incorporated society, whose object is the care, aid and education of neglected or destitute children, the county commissioners of such county, or the city council of any city or cities in such county, in addition to the powers now conferred upon such commissioners or city council, are hereby authorized, if they deem it judicious to aid any such institution to purchase land, erect buildings, either by subscription with others to raise a fund for that purpose, or by direct aid or donation, or otherwise, in amount not exceeding six thousand dollars, as they may deem expedient. [90 v. 27, 11; 66 v. 11.]

**Sec. 974 R. S.** [Duty of trustees and directors of infirmaries as to outside relief; costs of relief, how paid; reports to board of state charities, to contain what.] When, in any county having an infirmary, the trustees of a city or township shall, after making the inquiry provided for, be of the opinion that the person complained of is entitled to admission to the county infirmary, they shall forthwith transmit a statement of said facts, so far as they have been able to ascertain the same, to the infirmary directors, and if it appears that such person is legally settled in said township or has no legal settlement in this state, or that such settlement is unknown, and the directors are satisfied that said person should become a county charge, they shall forthwith receive said person and provide for him or her in said institution, or otherwise, and thereupon the liabilities of the township in the case shall cease, but the infirmary directors shall not be liable for any relief furnished, or expenses incurred by the township trustees. The infirmary directors shall report quarterly to the board of state charities, the names of all persons to whom relief has been given outside of the infirmary, whether medical or otherwise, together with their age, sex and nationality, whether such persons are married or single, and if married the number of persons in the family, and the ages of each; also the reasons for extending relief, the nature of the relief given, the amount of same, and any other information that may be prescribed by said board. [93 v. 266; 83 v. 202, 203; 80 v. 108; Rev. Stat. 1880; 74 v. 32, § 24; 76 v. 10, § 1.]



**Sec. 985 R. S. [Penalty for bringing pauper into city, township, or county with intent to charge with support.]** If a person transports, removes, or brings, or causes to be transported, removed, or brought, any poor or indigent person into any city, township, or county in this state, without lawful authority, and there leaves such poor indigent person, with intent to make such city, township or county chargeable with the support of such person, such person so offending shall forfeit and pay the sum of fifty dollars for every such offense, for the use of the poor of the city or township in which such person is left, to be recovered by civil action, in the name of the state, before any court of competent jurisdiction.<sup>1</sup> [93 v. 268; 77 v. 39; Rev. Stat. 1880; 77 v. 23, § 35; (S. & S. 534; S. & C. 932).]

(1) **Recovery of expense of support** of wife, who has been abandoned by husband and become a public charge. See Howard v. Whetstone Tp., 10 O. 365; Springfield Tp. v. Demott, 13 O. 104.

**Sec. 922—1 R. S. [Morgue for Cuyahoga Co. and Cleveland; coroner's duties.]** The county commissioners of Cuyahoga county be and they are hereby authorized to purchase a site for and erect a public morgue for the joint use of the city of Cleveland and the county of Cuyahoga, at an expense not to exceed \$40,000, and shall provide for the maintenance of the same out of any moneys in the general fund, provided, however, that no special tax shall be levied for the construction of the same, but shall be paid out of any fund not otherwise appropriated. That the county coroner shall have charge of said morgue and it shall be the duty of said coroner to see that all dead bodies brought to said morgue are properly kept and preserved until identified or claimed for burial and he shall collect from the friends or relatives of any person whose dead body was found within his county and which was caused to be kept and preserved as aforesaid, and who at the time of his or her said death was not a *bona fide* resident of said county, a sum not to exceed \$10, which sum shall be by said coroner turned over to the county treasurer of said county to be credited to the fund out of which said morgue is maintained. The coroner of said county shall before turning over dead bodies, as provided by section 3763 of the Revised Statutes of Ohio, cause such bodies to be photographed, and together with any other means of identification of said body shall cause the same to be preserved with the record of said death. [92 v. 678; 88 v. 898.]

Franklin Co. morgue authorized, 90 O. L. L. 171; 91 v. 718.

2. WORKHOUSES.<sup>1</sup>

## GENERAL PROVISIONS.

**Sec. 2100c R. S. [Cumulative sentence; habitual offender.]**

Every person who, after having been convicted, sentenced and imprisoned, in any workhouse for an offense committed heretofore or hereafter in this state in violation of an ordinance of [a] municipality, or a law of this state, shall be convicted of a second misdemeanor whether committed in violation of an ordinance of a municipality or a law of this state, punishable by imprisonment in any workhouse, within this state, shall for such second offense, be punished by imprisonment for not less than double the penalty imposed for the first offense; and in case of two previous convictions for such misdemeanors, the penalty for a third misdemeanor shall not be less than double the penalty imposed in the last of such previous misdemeanors. But no greater punishment shall be inflicted for the second or third misdemeanor, than the maximum penalty provided by law or ordinance for the particular offense committed. Every person who, after having been three times convicted, sentenced and imprisoned in any workhouse or workhouses for offenses committed heretofore or hereafter in this state, whether in violation of law or ordinance, shall be convicted of a fourth misdemeanor, whether committed in violation of an ordinance of a municipality or law of this state, punishable by imprisonment in any workhouse within this state, shall, upon conviction for such offense be held and deemed to be an habitual offender and shall be imprisoned in a workhouse for a period of not less than one year nor more than three years. - In all such cases the court may order that the offender stand committed to such workhouse until the costs of prosecution be paid. The fact of former conviction or convictions shall be charged in the information or complaint and, if proved, shall be stated in the commitment. A pardon for a former offense granted on the ground of innocence shall operate as a full defense in any charge under this section of a prior conviction for such offense. [92 v. 359; 90 v. 178.]

**(1) Title, division and chapter.**

—Sections under this heading were formerly contained in subd. 4, chap. 6, Div. 5, Title XII., R. S. Other provisions not given here, are reenacted in § 141 of the Code, p. 351.

**Workhouses under new Code.**

—*In cities*, see § 141 of the Code, page 351 *et seq.* *In villages*, see § 204 of the Code, page 456.

For provisions relating to Houses of Refuge, see § 141 of the Code, and sections of Revised Statutes reenacted therein, p. 352.

**Sec. 2101 R. S. [Prompt commitment; fees.]** The officer having the execution of the final sentence of any court, magistrate,

or mayor, shall cause the convict to be conveyed to the workhouse as soon as practicable after the sentence is pronounced; and all officers shall be paid the fees therefor allowed by law for similar services in other cases — such fees to be paid, when the sentence is by the court, out of the county treasury, and when by the magistrate, out of the township treasury. [66 v. 196, § 277.]

**Sec. 2103 R. S. [Punishment for escape or attempt to escape.]**

A person lawfully committed to a workhouse who escapes therefrom, or breaks the same with intent to escape therefrom, or who attempts by force, or in any other way, to escape therefrom, whether such escape be effected or not, shall, upon conviction before the police court, court of common pleas for the proper county, or the authority by which such person was originally committed, be punished by confinement in such workhouse for a term not exceeding double the term for which the person was so sentenced; and unless the former sentence has expired, the term shall commence from and after the expiration of the former sentence. [66 v. 196, § 279.]

**Sec. 2107 R. S. [Commissioners may unite with city in erecting workhouse.]** The commissioners of any county may unite with any city or village located in such county in the acquirement or erection, management and maintenance of a workhouse for the joint use of such county and city, or village, upon such terms as such county and city, or village may agree; and the commissioners are authorized to levy and collect the necessary funds therefor from the taxable property of the county; that the workhouse shall be managed and controlled by a joint board composed of the county commissioners and the board of public service of the city or the board of trustees of public affairs in villages; the said joint board shall have all the powers and duties in the management, control and maintenance of such workhouse as are conferred upon the board of public service in cities, and in addition thereto such board shall also have the right to construct sewers for said workhouse and pay for the same out of the funds raised by taxation for the maintenance of such institution and such board shall also have power to lease or purchase suitable property and buildings for a workhouse, or real estate, for the purpose of erecting and maintaining, a workhouse thereon, provided that said board shall not expend more than \$10,000.00 for any such purpose unless the amount be approved by a majority of the voters of the county, exclusive of the city or village voting at some general election. [97 v. 448; 81 v. 129; 68 v. 114.]

**Sec. 2107a(1) R. S. [City or district workhouse may receive persons sentenced from other counties.]** Any city or district having, or that may hereafter erect, within its limits, a workhouse,



may receive as inmates of such workhouse persons sentenced thereto as provided by law, from counties other than the one in which such workhouse is situated, upon such terms and during such length of time as may be agreed upon by the commissioners of such counties, or by the council of any municipality, and the county [council] of such city, or the board of district workhouses, or other authority having the management and control of such workhouse. Provided, that such convicts so received shall in all respects be and remain under the control of the board of workhouse directors, and subject to the rules, regulations and discipline of such workhouse, the same as other convicts therein detained. [1883, April 19; 80 v. 220.]

**Sec. 2107a(2) R. S. [Commissioners of counties may unite in erecting a workhouse; submitted to electors.]** The commissioners of any counties may unite in the erection, management and maintenance of a workhouse for the joint use of such counties, provided that before said workhouse can be established the question of the establishment of said workhouse shall be first submitted to the qualified electors of each of said counties at a general election and that a majority of the qualified electors voting upon this proposition in each county shall have voted in favor of the establishment of said workhouse; and provided further, that a notice of the submission of the question of building a workhouse to a vote at any general election shall be published for four weeks prior to said general election in a newspaper of general circulation of each county interested. [1883, March 29: 80 v. 81.]

**Sec. 2107b(1) R. S. [Board of directors.]** The construction, management and control of any workhouse established under section 2107a(2) of this chapter, and the maintenance and care of the convicts therein, shall be vested in a board of directors, who shall be called the board of workhouse directors, and shall be composed of two persons from each county, who are electors of the county from which they are appointed, and are freeholders therein, to be appointed by the board of county commissioners of each county composing said district, who shall belong to different political parties, one of whom shall hold his office for the term of six years, and one for the term of three years. The board of workhouse directors shall, at the first meeting, and annually thereafter, at the first meeting in May, elect a president, and at the same meeting appoint a secretary, who shall make a complete record of all the proceedings, and such other officers as may be necessary, and fix their compensation for their services. The board of directors shall not be entitled to any compensation for their services, but shall have all legitimate expenses paid connected with their duties. [90 v. 193; 80 v. 81, 82.]

Sec. 2107c(1) R. S. [Board to determine location, estimate cost, and certify same to county commissioners; commissioners to make levy; may issue bonds; the cost of maintaining; how paid.] Whenever any board of workhouse directors have complied with the requirements of section *twenty-one hundred and seven (b)*, they shall proceed to determine the location of said workhouse, and make an estimate of the cost thereof, including the cost of purchasing grounds for location, which, together with all other transactions of the board, shall be made a complete record thereof by the secretary in a book to be kept for that purpose, which record shall be approved by the board and countersigned by the president, and shall be open at all times to the inspection of any resident of the district. After the selection of a location and the approval of estimates as to the cost of purchasing a site and the construction of necessary buildings and appliances for said workhouse, the board shall certify over the seal of the president and secretary, to each of the "boards of county commissioners" within the district, the full amount of the estimated cost of location, construction, and maintenance of such workhouse for one year from the first regular meeting in May, next succeeding this certification. Thereupon each board of county commissioners shall levy upon the general duplicate of the county in which they are commissioners, a tax equal to each of said county's proportion of the entire estimated cost, in the proportion of each of said county's valuation in the general duplicate to the aggregate valuation of all of the counties joining the formation of the board and district. After such levies are made by each of the county boards of commissioners, each of said boards may anticipate said levies by the issuing of bonds, as provided in other cases, in sections *eight hundred and seventy-one* and *eight hundred and seventy-two*, of the Revised Statutes. The avails arising from the sale of such bonds shall be paid over to the treasurer of the board of workhouse directors, after said treasurer has filed with the board a bond, to be approved by the board, in double the amount of the estimated expense of construction and maintenance of said workhouse, and all payments for construction, maintenance, or any other purpose or expense whatever, shall be paid by said treasurer, when said bills shall have been approved by a majority of the board at any regular or adjourned meeting, and when a voucher therefor is issued by the secretary and countersigned by the president of the board. The cost of maintaining any workhouse established under the provisions of this act, over and above the proceeds arising from the sale of the products thereof,

shall be paid by each of the counties comprising the district, in proportion to the number of inmates furnished said workhouse by each county, to the aggregate number furnished by all; and said expense shall be paid quarterly by each of the boards of county commissioners, of the counties forming the district, upon the certificate of the secretary of the board of workhouse directors, approved by the board and countersigned by the president. And the boards of county commissioners are hereby authorized to levy a tax upon the general duplicate of the county, under the provisions of section *twenty-eight hundred and twenty-three*, of the Revised Statutes, such a sum as may be necessary, but not to exceed one-tenth of one mill, for the aforesaid maintenance. [1883, March 29: 80 v. 81, 82.]

**Sec. 2107d(1) R. S.** [Directors may enlarge buildings or grounds; may admit other counties.] The board of workhouse directors may enlarge or improve the buildings, shops or grounds from any surplus that may arise from sale of the products or from the levy for maintenance made by the counties forming the district, but no levy for maintenance shall be made when it has not been necessary to use more than one-half of the avails of the levy of the year preceding. And any surplus arising from the carrying on of the district workhouse shall be returned to the general fund of each of the counties comprising the district, in the proportion to the number of inmates furnished by each of said counties to the whole number furnished by the district for the current year. The board of workhouse directors may receive any other county into the district upon such terms and conditions as the board may determine, and when any county is thus admitted they shall be entitled to a member of the board as provided in section *twenty-one hundred and seven (b)*. [1883, March 29: 80 v. 81, 83.]

**Sec. 2107e(1) R. S.** [Who shall be confined therein; term; procedure when sentenced by court of common pleas; when convicted by any other court; may be confined in jail a reasonable period.] When a person has been convicted of a misdemeanor by any court or magistrate of this state in a district in which there is a workhouse, it shall be competent for such court or magistrate to sentence such person to such workhouse for a period not exceeding the maximum period of confinement in the jail of the county allowed by statute for such offenses; and in all such cases the court or magistrate may further order that such person stand committed to such workhouse until the costs of prosecution are paid, or he be discharged as herein provided; and in all cases where a fine may be imposed in punishment in whole



or in part for an offense and the court or magistrate could order that such person stand committed to the jail of the county until such fine and the costs of prosecution are paid, such court or magistrate may order that such person stand committed to such workhouse until such fine and costs are paid, or until he be discharged at the rate of sixty cents per day for each day of confinement, or be otherwise legally discharged. When a person is sentenced to such workhouse by the court of common pleas, the clerk shall make and deliver to the sheriff a certified copy of the docket and journal entries showing the crime charged and the sentence of the court, which shall be delivered by the sheriff to the proper officer in charge of such workhouse, and shall be his warrant for detaining such person in custody therein; in cases of such convictions by any other court or magistrate,<sup>1</sup> such court or magistrate shall make a certified transcript of the docket in such case, which shall in like manner be delivered to the marshal or constable, or sheriff by such court or magistrate, which shall be delivered by such officer to the proper officer in charge of such workhouse, and shall be his warrant for detaining such person in custody therein; in all cases of sentence to a workhouse under the provisions of this act, the person so sentenced may be confined in the jail of the county for such period as may be reasonably necessary for the officer to procure the papers and make arrangements to transport him to such workhouse. [1883, March 29: 80 v. 81, 83.]

(1) **Prisoners coming from other counties.**—When persons from other counties are committed to a workhouse, a full transcript of the docket of the magistrate committing should accompany the mit-

*timus*. *Edis v. Butler*, 8 N. P. 183 (aff'd 68 O. S. 645).

But the *mittimus* is not necessary when officer who brings prisoner also brings the transcript. *Anonymous*, 7 N. P. 554.

#### JOINT CITY AND COUNTY WORKHOUSE IN MUSKINGUM COUNTY.

**Sec. 2107a(3) R. S.** [Commissioners authorized to unite with Zanesville in erection and maintenance of a workhouse.] The commissioners of any county containing a population by the last census of 49,774 may unite with any city, located in said county, in the erection, management and maintenance of a workhouse for the joint use of such county and city; and the commissioners are authorized to levy and collect the necessary funds therefor from the taxable property of the county; provided, that the commissioners shall not collect and expend a greater amount than shall be collected and expended by such

city for the same purpose; and provided further, that not more than ten thousand dollars shall be levied or appropriated by the commissioners for the purpose unless the amount be approved by a majority of the voters of the county, exclusive of the city, voting at some general election. [1887, March 19: 84 v. 136.]

**Sec. 2107b (2) R. S. [Board of directors.]** The direction, management and control of any such joint workhouse, and the maintenance and care of the convicts therein, shall be vested in a board of five directors, who shall be called, "the board of joint city and county workhouse directors," and such directors shall be freehold electors of such county, and shall serve without compensation, and not more than three members of "the board of joint city and county workhouse directors" shall be of the same political party faith. [91 v. 385; 84 v. 136, 137.]

**Sec. 2107c(2) R. S. [Appointment of board; terms of members.]** The directors shall be appointed by the mayor of the city having such joint workhouse, with the approval of the council of such city, and shall hold their office for five years, except that at the first appointment one director shall be appointed for one year, one for two years, one for three years, one for four years, and one for five years, and thereafter one shall be appointed annually, but hereafter all appointments shall be made in conformity with section 2107b [91 v. 386; 84 v. 136, 137.]

**Sec. 2107d(2) R. S. [President, secretary and clerk of board.]** The board of such joint city and county workhouse directors shall elect annually, at its first regular meeting in May, one of its members as president, and at the same meeting appoint a secretary and clerk, who shall make a complete record of all its proceedings, and the said board may appoint such other officers as may be necessary, and fix the compensation of all officers for their services. [1887, March 19: 84 v. 136, 137.]

**Sec. 2107e(2) R. S. [Contracts.]** Contracts may be made by or on behalf of the board; but it shall be essential to the validity of every such contract, that the same be assented to at a regular meeting by a majority of all the members, and a minute thereof entered on the journal of its proceedings. [1887, March 19: 84 v. 136, 137.]

**Sec. 2107f R. S. [Superintendent and other employes.]** The board shall have power to appoint a superintendent, deputy superintendent and such subordinate officers, guards and employes as may be necessary, fix their compensation and prescribe their duties, and to make all such regulations for their

management and government as it may deem expedient. [1887, March 19: 84 v. 136, 137.]

**Sec. 2107g R. S. [Rules and Regulations.]** The board shall have power to make, establish and enforce rules and regulations for its own government, and the government and control of the institution, its officers and inmates, and make contracts for supplies and the labor of its inmates. [1887, March 19: 84 v. 136, 137.]

**Sec. 2107h R. S. [Books: how kept.]** The books of the institution shall be so kept as to clearly exhibit the time, state and condition of the inmates, the number received and discharged, and by what court, and for what cause committed, the length of time of the commitment of each person, the number of days' labor performed by each convict, and the nature and value of such labor to such institution, and the relative costs and expenses incurred by the institution in managing and taking care of each convict, and the number employed in each branch of industry carried on, and the receipts from and expenditures for and on account of each department of business. [1887, March 19: 84 v. 136, 137.]

**Sec. 2107i R. S. [Quarterly statements.]** The board shall cause quarterly statements to be made, specifying minutely all receipts and expenditures, from whom and for what purpose received, and to whom and for what purpose paid, with proper voucher for each item, and submit such statement properly certified to the council of such city, and the commissioners of such county, for their examination and approval. [1887, March 19: 84 v. 136, 138.]

**Sec. 2107j R. S. [Annual report.]** The accounts of the institution shall be annually closed and balanced on the first Monday of January in each year. And full reports of the preceding year shall then be made and submitted to the city council and county commissioners, which shall be published in some newspaper of such city of general circulation in the county, or in such other form as the board of directors may determine; and the city council and county commissioners, or either of such bodies, may require such other reports and exhibits of the condition and management of such institution as they may deem proper. [1887, March 19: 84 v. 136, 138.]

**Sec. 2107k R. S. [Powers and duties of superintendent.]** The superintendent of such workhouse shall have the control and management of its affairs, subject to the laws of the state and the ordinances of the corporation, and the rules and regulations



adopted by the board for its government. And it shall be his duty to obey all written orders and instructions of the board not inconsistent with the laws, rules, and regulations relating to the government of the institution. [1887, March 19: 84 v. 136, 138.]

**Sec. 2107l R. S. [General powers of superintendent.]** The superintendent shall be responsible for the manner in which the institution is managed and conducted, shall reside at the same, devote his time and attention to the proper business thereof, and visit and examine into the condition of every department thereof, and of each person confined therein, daily, or as often as good order or necessity may require, and he shall exercise a general supervision and direction in regard to all matters of discipline, police regulation and business of the institution. [1887, March 19: 84 v. 136, 138.]

**Sec. 2107m R. S. [Deputy superintendent.]** In the absence or inability of the superintendent, the deputy superintendent of the institution shall, so far as relates to the discipline thereof, perform the duties of the superintendent. [1887, March 19: 84 v. 136, 138.]

**Sec. 2107n R. S. [Removal of officers and employes.]** The board for misconduct or willful neglect of duty, and upon sufficient proof thereof, may remove any officer or employe of the institution, except the superintendent thereof, who shall be removed for cause and in the manner provided for the removal of city officers; and any employe of the superintendent may be discharged at his discretion, but no officer shall be removed by the board, until he has had an opportunity to be heard in his defense. [1887, March 19: 84 v. 136, 138.]

**Sec. 2107o R. S. [Cost of maintaining such workhouse, how paid; levy of tax; dividing deficiency in products of workhouse.]** The costs of maintaining such joint city and county workhouse over and above the proceeds arising from the sale of the products thereof, shall be borne by such city and county jointly, and such expenses shall be paid quarterly by such city and county out of the respective treasuries thereof, upon the certificate of the secretary of such joint city and county workhouse on the approval of the council of such city, and the commissioners of such county. And the board of county commissioners of any county having such joint city and county workhouse, are hereby authorized and required to levy upon the general tax duplicate of the county outside of the corporate limits of such city, such sum as may be necessary, not exceeding five-tenths of one mill on the dollar valuation; and the city

council of such city are hereby authorized and required to levy upon the general tax duplicate of such city, such sum as may be necessary, but not exceeding one mill on the dollar valuation for the aforesaid maintenance; and the board of such joint city and county workhouse directors, the city council of such city and the county commissioners of such county, in ascertaining and determining at the end of each quarter the amount to be paid to such board to meet any deficiency in the products of such joint workhouse to maintain the same, shall take into account and be governed by the number of convicts furnished by such city and such county, the number of days' labor performed by the convicts from each, the value of such labor, and the relative costs and expenses of taking care of, managing, and disciplining the convicts of each, and give to such city and county each full credit for the value of the products of such workhouse produced by the labor, skill and diligence of the convicts from each, and charge to the account of each (city and county) the costs to such institution of working, managing, maintaining, taking care of, and disciplining its convicts, and make assessments upon such city and county for the maintenance of such institution accordingly. [1887, March 19: 84 v. 136, 138.]

**Sec. 2107p R. S. [Inmates from other counties.]** Any city and county or county having or that may hereafter erect a joint city and county workhouse, or a county workhouse, may receive as inmates of such joint city and county workhouse, or county workhouse, persons sentenced thereto as provided by law, from counties and municipal corporations having no workhouse, upon such terms and for such length of time as may be agreed upon by the commissioners of such county or the council of such municipal corporation, and the board of such joint city and county workhouse directors, or county workhouse directors; provided, that such convicts so received shall, in all respects, be and remain under control of the directors of such workhouse, and subject to the rules, regulations and discipline of such workhouse the same as other convicts therein detained. [91 v. 180; 84 v. 136, 139.]

**Sec. 2107q R. S. [Counties and cities having no workhouse may make provisions for care of prisoners in workhouse of other county, etc.; payment of expenses; fees of officers.]** The commissioners of any county, or the council of any municipal corporation, wherein there is no workhouse, may agree with the council of any municipal corporation or other authority having control of the workhouse of any other city, or with the directors of

any district or joint city and county workhouse, or county workhouse, upon terms and conditions, upon which persons convicted of misdemeanor, or of the violation of any ordinance of such municipal corporation by any court of [or] magistrate of such county or municipal corporation, having no workhouse, may be received into such workhouse, under sentence of such court or magistrate; and the county commissioners of any such county, and the council of any such municipal corporation, are authorized to pay the expenses incurred under such agreement out of the general fund of such county, or of the municipal corporation, upon the certificate of the proper officer of such workhouse; and the sheriff or other officer transporting any person to such workhouse shall have the following fees therefor: Six cents per mile for himself, going and returning, and five cents per mile for transporting such convict, and five cents per mile going and coming for the service of each guard, to be allowed as in penitentiary cases; the number of miles to be computed by the usual routes of travel, to be paid in state cases out of the general fund of the county, on the allowance of the county commissioners, and in case for the violation of the ordinances of any municipal corporation by such municipal corporation on the order of the council thereof. [91 v. 180; 84 v. 136, 139.]

**Sec. 2107r R. S.** [Sentence and order of court in such cases; credits on fines.] When any person has been convicted of a misdemeanor or of the violation of any ordinance of a municipal corporation, by any court or magistrate of this state, or of such municipal corporation, in a county or municipal corporation having no workhouse, and the commissioners of such county, or council of such municipal corporation have made provisions as allowed by law for receiving persons so convicted into the workhouse of a city in any other county or district, or a joint city and county workhouse, or a county workhouse in this state, it shall be competent for such court or magistrate, in its discretion, where imprisonment in the county or municipal jail may by law or ordinance be imposed in punishment of such offense, to sentence such person to such workhouse for a period not exceeding the maximum period of confinement in the county or municipal jail allowed by statute or ordinance for such offense; and in all such cases such court or magistrate may further order that such person stand committed to such workhouse until the costs of prosecution are paid, or he be discharged, as herein provided; and in all cases where a fine may be imposed in whole or in part punishment of an offense, or for violation



of an ordinance of any municipal corporation, and such court or magistrate could order that such person stand committed to the jail of the county or municipal corporation until such fine and costs of prosecution are paid, such court or magistrate may order that such person stand committed to such workhouse until such fine and the costs of prosecution are paid, or until he be discharged therefrom by allowing a credit of sixty cents per day on such fine and costs for each day of confinement in such workhouse, or be otherwise legally discharged. [91 v. 181; 84 v. 136, 140.]

**Sec. 2107s R. S. [Warrant for commitment and detention; confinement in jail.]** When a person is sentenced to such workhouse by the common pleas court, the clerk thereof shall make and deliver to the sheriff a certified copy of the docket and journal entries, showing the crime charged and the sentence of the court, which shall be delivered by the sheriff to the proper officer in charge of such workhouse, which shall be his warrant for detaining such person in custody therein; in cases of such convictions by any other court or magistrate such court or magistrate shall make a certified transcript from the docket in such case, which shall in like manner be delivered to the marshal or constable, or sheriff, by such court or magistrate, which shall be delivered by such officer to the proper officer in charge of such workhouse, which shall be his warrant for detaining such person in custody therein; in all cases of sentences to a workhouse, the person so sentenced may be confined in the jail of the county or corporation prison for such period as may be reasonably necessary for the officer to procure the papers and make arrangements to transport him to such workhouse. [1887, March 19: 84 v. 136, 140.]

**Sec. 2107t R. S. [Payment of fines and costs.]** When a person is committed to such workhouse under sentence that he stand committed to such workhouse until the fine and costs of prosecution assessed against him are paid, as provided in section *two thousand one hundred and seven* (*p*) of this act, such person may pay in money, in whole or in part, to the board of workhouse directors, such fine and costs assessed against him, and the said board shall receive and turn the same quarterly, into the treasury of the county from which such person was committed; provided, that such person was so committed for the violation of any law of the state; and when any person so committed for the violation of an ordinance of a municipal corporation shall make such payment to such board, it shall be its duty to receive and quarterly turn the same into the treas-

ury of the municipal corporation from which such person was committed. [1887, March 19: 84 v. 136, 141.]

**Sec. 2107u R. S. [Improvement, etc., of grounds, buildings, etc.]** The board of joint city and county workhouse directors, or county workhouse directors, may enlarge or improve the buildings, shops or grounds from any surplus that may arise from income of such workhouse, or from the levy for such maintenance made by such county and city, or county; but no levy for maintenance shall be made when it has not been necessary to use more than one-half of the avails of the levy of the year preceding; and any surplus arising from the carrying on of [the] such joint workhouse shall be returned to the general fund of such city and county in the proportion that such surplus may have been produced by the labor of the convicts of each, and any surplus arising from the carrying on of such county workhouse shall be returned to the general fund of the county. [91 v. 181; 84 v. 136, 141.]

**Sec. 2107v R. S. [Fees of officers.]** In all cases of sentence and commitment to such joint city and county workhouse, all officers shall be paid the same fees therefor allowed by law for similar services in other cases; such fees in cases of misdemeanor, shall be paid out of the county treasury of the county from which such commitment was made, and when such sentence is for violation of an ordinance, such fees shall be paid out of the treasury of the municipal corporation from which such commitment was made. [1887, March 19: 84 v. 136, 141.]

**Sec. 2107w R. S. [Workhouse directors may provide for parole of prisoners.]** The foregoing board of joint city and county workhouse directors shall have power to establish rules and regulations under which and specify the conditions on which any prisoner may be allowed to go upon parole outside of the buildings and enclosures, but to remain, while on parole, in the legal custody and under the control of the board, and subject at any time to be taken back within the enclosure of said institution; and full power to enforce such rules and regulations; and conditions, and to retake and re-imprison any convict so upon parole, is hereby conferred upon said board, whose written order, certified by its secretary, shall be a sufficient warrant for all officers named therein, to authorize such officer to return to actual custody any conditionally released or paroled prisoner; and it is hereby made the duty of all officers to execute said order the same as ordinary criminal process; and said board may employ or authorize any person or persons to see that the conditions of

said paroles are not violated, and in case of such violation to return any such prisoner so violating said parole to said work-house, and the time between the violation of the conditions of such parole or conditional release (by whatever name), as entered by order of the board in the record of its meetings, and the re-imprisonment or return of such prisoner shall not be counted as any part or portion of time served under any sentence; and any prisoner at large upon such parole who fails to return to the actual custody of said workhouse as may be specified as one of the conditions of his parole, or commits a fresh crime and is convicted thereof, shall be, on the order of said board, treated as an escaped prisoner and subject to the penalties named in section two thousand one hundred and three (2103) of the Revised Statutes. [87 v. 39.]

#### AGREEMENT FOR USE OF WORK-HOUSE.

**Sec. 6801a R. S.** [Counties having no work-house may contract with work-house authorities; fees for transporting persons to work-house.] It shall be competent for the commissioners of any county or the council of any municipality, wherein there is no work-house, to agree with the city council or other authority having control of the work-house of any city in any other county, or with the board of district work-houses having a work-house, upon terms and conditions upon which persons convicted of misdemeanors, or of the violation of any ordinance of such municipality, by any court or magistrate of such county or municipality having no work-house, may be received into such work-house under sentence of such court or magistrate; and the county commissioners, or the council of any municipality are authorized to pay the expenses incurred under such agreement, out of the general fund of the county or municipality, upon the certificate of the proper officer of such work-house; and the sheriff or other officer transporting any person to such work-house shall have the following fees therefor: six cents per mile for himself, going and returning, and five cents per mile for transporting each convict, and five cents per mile going and coming for the services of each guard, to be allowed as in penitentiary cases, the number of miles to be computed by the usual routes of travel, to be paid in state cases out of the general fund of the county, on the allowance of the county commissioners, and in cases for the violation of the ordinances of any municipality, by such municipality on the order of the council thereof. [1884, March 26: 81 v. 84; 80 v. 220.]

**Sec. 6801b R. S.** [Courts may sentence to work-house for jail offense.] When any person has been convicted of a misdemean-



or, or of the violation of any ordinance of a municipality by any court or magistrate of this state or such municipality, in a county or municipality having no work-house, and the commissioners of such county, or council of such municipality, have made provisions as allowed by law for receiving persons so convicted into the work-house of a city in any other county or district in the state, it shall be competent for such court or magistrate, in its discretion, where imprisonment in the county or municipal jail, may by law or ordinance be imposed, in punishment of such offense, to sentence such person to such work-house for a period not exceeding the maximum period of confinement in the county or municipal jail allowed by statute or ordinance for such offense; and in all such cases, such court or magistrate may further order that such person stand committed to such work-house until the costs of prosecution are paid, or he be discharged as herein provided; and in all cases where a fine may be imposed in whole or part in punishment of an offense, or for a violation of an ordinance of any municipality, and such court or magistrate could order that such person stand committed to the jail of the county or municipality until such fine and the costs of prosecution are paid, such court or magistrate may order that such person stand committed to such work-house until such fine and the costs of prosecution are paid, or until he be discharged therefrom by allowing a credit of sixty cents per day on such fine and costs for each day of confinement in such work-house, or be otherwise legally discharged. [1884, March 26: 81 v. 84; 80 v. 221.]

**Sec. 6801c R. S. [Proceedings when committed by common pleas court; when committed by other court.]** Where under the provisions of the preceding sections, a person is sentenced to such work-house by the court of common pleas, the clerk shall make and deliver to the sheriff a certified copy of the docket and journal entries showing the crime charged and the sentence of the court, which shall be delivered by the sheriff to the proper officer in charge of such work-house and shall be his warrant for detaining such person in custody therein; in cases of such convictions by any other court or magistrate, such court or magistrate shall make a certified transcript of the docket in such case, which shall in like manner be delivered to the marshal, or constable, or sheriff by such court or magistrate, which shall be delivered [by] such officer to the proper officer in charge of such work-house and shall be his warrant for detaining such person in custody therein; in all cases of sentences to work-house under the provisions of this act, the person so sentenced may be con-

fined in the jail of the county for such period as may be reasonably necessary for the officer to procure the papers and make arrangements to transport him to such work-house. [1883, April 19: 80 v. 221.]

### 3. HOSPITALS.<sup>1</sup>

**Sec. 2153 R. S.** [Board of hospital commissioners.] When the council of a city or village enters upon and takes possession of grounds purchased, appropriated, or otherwise obtained for hospital purposes, and, by resolution or ordinance, determines to erect thereon or rebuild a hospital, the erection and repair thereof, or any addition thereto, and the management, direction, and control of the same, shall be vested in a board of five commissioners, called the "Board of Hospital Commissioners."<sup>2</sup> [66 v. 197, § 283.]

(1) **Title, division and chapter.**—Sections here given formed part of Chap. 3, Div. 6, Title XII., R. S., relating to hospitals. For re-enacted sections (2165, and 2167-9 to 2167-21, inclusive) see §§ 141 and 220 of the Code, pp. 365 and 497.

(2) **Managing board.**—*In cities* see § 141 of the Code, page 351. *In villages*, see § 204 of the Code, page 456.

**Scope of authority.**—See *Zanesville v. Crossland*, 8 C. C. 652, reversed in 56 O. S. 735.

**Liability for negligence.**—There is no liability on the part of a corporation maintaining a charity hospital for the negligence of a nurse selected with due care. *Connor v. Sisters of the Poor*, 7 N. P. 514.

**Power to establish and maintain hospitals** is conferred upon all municipalities in paragraph 16 of § 7 of the Code, page 55. Power to appropriate property for hospital purposes, see § 10 of the Code, page 81.

**Sec. 2154 R. S.** [Who shall compose the board.] The board<sup>1</sup> shall consist of the mayor, who shall, by virtue of his office, be its president, and four trustees, to be appointed by the mayor, with the consent of the council, each of which commissioners shall be resident freehold electors of the corporation, and they shall not receive any compensation for their services. [66 v. 197, § 284.]

(1) **Managing board.**—*In cities* see § 141 of the Code, page 351. *In villages*, see § 204 of the Code, page 456.

**Sec. 2154a R. S.** [In Portsmouth board of public affairs<sup>1</sup> to exercise powers of hospital commissioners.] In cities of the second class, third grade *c* the board of public affairs shall have the powers, and perform the duties conferred and imposed

upon the board of hospital commissioners, in such cities, by chapter three, division six, title twelve of the Revised Statutes of Ohio. [93 v. 616.]

(1) See note (1) to § 2154 R. S., *supra*.

**Sec. 2155 R. S. [Their terms of office.]** The term of office of the appointed members of the board<sup>1</sup> shall be four years, but the members first appointed shall hold their offices, respectively, as shall be determined by lot, at the first meeting of the board, for the period of one, two, three, and four years, and thereafter one member shall be appointed each year for the full term of four years; and a majority of the board shall constitute a quorum. [66 v. 197, § 285.]

(1) See note (1) to § 2154 R. S., *supra*.

**Sec. 2156 R. S. [Their powers, compensation of appointees, etc.]** The board<sup>1</sup> shall have power to appoint a clerk, an architect, a superintendent, and other necessary employes, fix their compensation, and adopt a suitable plan for such hospital, and make all contracts for the erection and furnishing of the same; but the salary of the appointees, and the plan of the hospital, before any contract for its erection is entered into, shall be submitted to and approved by the council. [66 v. 197, § 286.]

(1) See note (1) to § 2154 R. S., *supra*.

**Sec. 2157 R. S. [Regular meetings, and record thereof.]** The board<sup>1</sup> shall hold regular meetings at such time and place as may be agreed upon, and cause to be kept a full record of its proceedings; and no contract which it enters into shall be valid until assented to at a regular meeting and concurred in by a majority of all the members, and such assent entered on the minutes of its proceedings. [66 v. 197, § 287.]

(1) See note (1) to § 2154 R. S., *supra*.

**Sec. 2158 R. S. [No expenditure without authority of board; no member to be interested, etc.]** No money shall be paid for the erection, rebuilding, or repair of a hospital, or for an addition thereto, or for supplies therefor, unless first authorized by the board,<sup>1</sup> and upon the warrant of the proper officer of the corporation; and no member of the board shall be interested,<sup>2</sup> directly or indirectly, in any contract concerning the institution. [66 v. 197, § 288.]



(1) See note (1) to § 2154 R. S., *supra*. **tract.**—See § 45 of the Code and note 3 thereunder, page 177.

(2) **Officer interested in con-**

**Sec. 2159 R. S. [Plans, specifications, etc.]** It shall be the duty of the board,<sup>1</sup> before entering into any contract for the erection of a hospital building, to cause plans, specifications, detailed drawings, and forms of bids to be prepared; and when adopted by the board, it may, at its discretion, cause the plans and drawings to be lithographed, and the specifications, and forms of bids, and a form of contract and bond, to be prepared by the solicitor of the corporation, and have the same printed for distribution among the bidders. [66 v. 198, § 289.]

(1) See note (1) to § 2154 R. S., *supra*.

**Sec. 2160 R. S. [Terms of contracts, etc.]** All contracts shall be made in the name of the corporation, and it shall be stipulated therein that the contractors will not execute any extra work, or make any modifications or alterations mentioned in the specifications and plans, unless ordered in writing by the board;<sup>1</sup> that they will not claim any pay for the same unless such written order is given, and the extra price of compensation fixed and agreed upon; and copies of the plans and drawings, attested by the contractor, and the original bids, specifications, and contracts shall be deposited in the office of the clerk of the corporation.<sup>2</sup> [66 v. 199 (198), § 290.]

(1) See note (1) to § 2154 R. S., *supra*.

(2) **Waiver of written orders.**  
—Where hospital board reserved the right to change, alter, or modify plans, and exercised the right, but no written orders were issued

to contractor, it was held that the action of the board amounted to a waiver of written orders and contractor could recover for work done. *Cincinnati v. Cameron*, 33 O. S. 336. But see *Wellston v. Morgan*, 65 O. S., 219.

**Sec. 2161 R. S. [Proposals to be advertised for.]** The board<sup>1</sup> shall not enter into any contract for work or materials, except as relates to procuring plans, drawings, specifications, and forms of bids, without first causing thirty days' notice to be given in one or more newspapers of general circulation in the corporation, that sealed proposals will be received for doing the work or furnishing the materials. [66 v. 199 (198), § 291.]

(1) See note (1) to § 2154 R. S., *supra*.

**Sec. 2162 R. S.** [Bids to be accompanied by bond, etc.] Each bid shall be accompanied with a bond, signed by sufficient sureties, for the acceptance of the contract, if awarded by the board,<sup>1</sup> to fully secure any difference between the amount of such bid and the next higher bid; and such amount shall be collected by the board, and paid into the hospital fund, in case of refusal by the bidder to enter into contract according to his bid, within such reasonable time as the board may determine. [66 v. 199 (198), §292.]

(1) See note (1) to § 2154 R. S., *supra*.

**Sec. 2163 R. S.** [Bids to be sealed, indorsed, etc.] All bids shall be inclosed in a sealed envelope and deposited with the clerk of the board, and such sealed envelope shall have indorsed thereon the nature of the same; and all bids shall be opened at a regular meeting of the board.<sup>1</sup> [66 v. 198, § 294.]

(1) See note (1) to § 2154 R. S., *supra*.

**Sec. 2164 R. S.** [Contract with lowest bidder.] The board<sup>1</sup> shall enter into contract with the lowest responsible bidder,<sup>2</sup> upon his giving bond to the corporation, with such surety as the board shall approve, that he will perform the work and furnish materials in accordance with his contract; and on failure of such bidder, within a reasonable time, to be fixed by the board, to enter into bond with the surety before provided, a contract may be made with the next lowest responsible bidder, and so on, until a contract is effected by a contractor giving bond as aforesaid; provided, that the board may reject any and all bids.<sup>3</sup> [66 v. 198, § 293.]

(1) See note (1) to § 2154 R. S., *supra*.

(3) § 2165 R. S. is re-enacted in § 141 of the Code.

(2) **Letting of contracts.**— See notes to § 143 of the Code.

**Sec. 2166 R. S.** [Council may enter into agreement with any corporation, etc.]<sup>1</sup> The council may enter into an agreement with a corporation or association, organized for charitable purposes in such municipal corporation, for the erection and management of a hospital for the sick and disabled, and for a permanent interest therein, to such extent and upon such terms and conditions as may be agreed upon between the council and such corporation or association; and the council shall provide for the payment of the amount agreed upon, for any interest so acquired, either in one payment, or installments, or so much,

from year to year, as the parties may stipulate.<sup>2</sup> [66 v. 199, § 296.]

(1) **Public use of private corporation's hospital.**—See paragraph 23 of § 7 of the Code, page 61.

(2) **Contracting power of council.**—See *Zanesville v. Crossland*, 8 C. C. 652, reversed, without report, in 56 O. S. 735.

**Sec. 2167 R. S. [Exception of application as to Commercial Hospital of Cincinnati.]** The provisions of this chapter shall, so far as applicable, govern hospitals heretofore established and erected; but nothing in this title repeals any part of the act of March 11, 1861, "regulating the Commercial Hospital of Cincinnati," or the acts amendatory thereof and supplementary thereto.<sup>1</sup> [67 v. 33, § 297.]

(1) **Government of Cincinnati Hospital.**—The government of the commercial hospital of Cincinnati was held under former laws to be in the board of trustees and city to have no authority over it. *State v. Cincinnati*, 23 O. S. 445; *State v. Davis*, 23 O. S., 434. But in *Cincinnati v. Trustees*, 66 O. S., 440, it was held that the Cincinnati hospital, whether originally a state or a municipal institution, had become,

by virtue of numerous legislative enactments, a municipal institution.

The new Code now confers upon the board of public service in all cities the management and control of municipal hospitals. See § 141 of the Code. The sections which follow, 2167-1 to 2167-6 R. S., inclusive, are special acts for the government of the Cincinnati hospital, and are not expressly repealed by the Code.

**Sec. 2167—1 R. S. [Cincinnati hospital.]** The public infirmary in the city of Cincinnati, established by an act entitled "an act establishing a commercial hospital and lunatic asylum for the State of Ohio," passed January 22, 1821, shall hereafter be called and known by the name of the "Commercial Hospital of Cincinnati,"<sup>1</sup> and shall remain upon the present hospital lot, and shall be used for the reception and care of such sick persons as may by law be entitled to admission therein for treatment as patients. [58 v. 151.]

(1) By a supplementary act passed April 3, 1868 (65 v. 232) the name of the "Commercial Hos-

pital of Cincinnati" was changed to the "Cincinnati Hospital."

**Sec. 2167—2 R. S. [Government and control thereof; trustees: how appointed; term of office.]** The government and control of said hospital shall be vested in a board of seven trustees,<sup>1</sup> to be created as follows: The mayor of the city of Cincinnati and the director of the city infirmary of said city eldest in



commission shall, *ex-officio*, be members of said board; one trustee shall be appointed by the governor of the state, two by the judges of the superior court of Cincinnati, and two by the judges of the court of common pleas of Hamilton county. The term of office of said trustees so appointed shall be five years, except that those first appointed shall be classified by lot, so that their terms shall expire in one, two, three, four and five years respectively. All vacancies from any cause shall be filled for the unexpired terms as originally provided. Said trustees shall receive no compensation. [58 v. 151.]

(1) **Government of Cincinnati hospital.**—See note to § 2167 R. S., *supra*.

**Sec. 2167—3 R. S.** [Trustees to make rules and appoint attendants.]<sup>1</sup> The trustees<sup>2</sup> shall have the exclusive management of said hospital; they shall make rules and regulations for the conduct and government of the same; they shall appoint such officers and servants of said hospital, including all medical attendants resident therein, as they may deem necessary, and may remove them at pleasure, and shall fix their compensation. [58 v. 151.]

(1) Supplemental § 2167-3a R. S. (2) See note to § 2167 R. S., 95 O. L. 259 was repealed by Code. *supra*.

**Sec. 2167—4 R. S.** Board of trustees may levy a tax for certain purposes; proviso; board to make rules for the government of the hospital.] That the board of trustees<sup>1</sup> of the Cincinnati Hospital are hereby authorized to levy a tax not exceeding *forty-eight one-hundredths* of one mill on the dollar valuation on the grand duplicate of all taxable property in said city of Cincinnati, in each and every year, and certify the same to the auditor of the city of Cincinnati, on or before the first Monday of June annually; and the county auditor shall place the same on the tax duplicate of said county, the receipts whereof shall be paid into the county treasury, as a special fund for the payment of all expenses incurred for building, rebuilding, furnishing, supplying, and supporting said hospital and grounds; and the city treasurer shall disburse the same, on the order of the board of trustees, signed by the president, and countersigned by the secretary of said board; provided, that the said trustees shall levy only the amount of taxes necessary for the purposes before mentioned; and the amount which the council of the city of Cincinnati is now authorized to levy, shall be and is hereby reduced

by the amount which the said trustees shall certify to the said auditor, as herein provided; and in no one year shall the amount so certified by the said trustees, and the amount authorized to be levied by council, exceed the amount which said council has a right by law to levy. The board of trustees shall adopt rules and regulations for the government of said institution, and for the admission of patients and discharge of convalescents from said hospital and said branch hospitals, as may be established by law. [1878, May 13; 75 v. 1166; 72 v. 197; 61 v. 142; 58 v. 161, 162; 58 v. 151.]

(1) See note to § 2167 R. S., *supra*.

**Sec. 2167—5 R. S.** [Duties and rights of the faculty of the medical college of Ohio; trustees to make suitable provisions; power of the trustees; admission of pupils of other colleges into the hospital; library; medical library may be deposited in public library of the city of Cincinnati; proviso.] It shall be the duty of the faculty of the medical college of Ohio,<sup>1</sup> to visit and attend the patients in said hospital, and to render them proper medical and surgical advice and service without compensation therefor, in consideration of which said faculty shall have the privilege of introducing the pupils of said college into said hospital, under such regulations as the trustees<sup>2</sup> may prescribe, to witness the medical and surgical treatment of patients. The trustees may make such provisions as to them may seem advisable, for medical and surgical advice and service to said patients additional to or other than that rendered by said faculty; but no compensation shall be paid therefor, except to medical attendants resident in the hospital. The trustees shall, under such regulations as they may prescribe, admit medical students, not pupils of said college, to witness the medical and surgical treatment of patients in said hospital. The trustees shall have the power, whenever they may deem it for the welfare of said patients so to do, to dismiss the faculty of said college from attendance on said hospital. The trustees may affix to the introduction or admission into said hospital of the pupils of said college or other medical students, such fee as they may deem proper; but the same shall be alike to all, and shall be paid to the treasurer of the city of Cincinnati, and be used as a fund for establishing and maintaining a medical library and museum for said hospital; and said board of trustees shall, from time to time appropriate and apply said fund for the purchase of a library of scientific books and specimens, and illustrations directly connected with, and collateral to, the culti-

vation of medical and surgical science, which shall be open at reasonable hours to all physicians of the city of Cincinnati, and to all such pupils and medical students admitted to the privileges of said hospital, as aforesaid, free of charge. The trustees shall expend, annually, at least two-thirds of said fund for books, periodicals, and binding for said medical library, and the said medical library shall be kept in said commercial hospital of Cincinnati, but in the discretion of the board of trustees of the said commercial hospital of Cincinnati may be deposited in the fire-proof building of the public library of Cincinnati; *provided*, the managers of said public library shall receive it free of charge, provide separate alcoves or apartments for it, catalogue, and furnish a distinctive label to each book of said medical library, and keep it accessible to those entitled to its use. The trustees shall publish annually, a statement of the receipts and expenditures of said fund. [1875, March 27: 72 v. 223; 67 v. 120; 58 v. 151.]

(1) **Faculty of college.**—The faculty are to render such services without compensation as is consistent with their duties as professors and practitioners. *Alexander v. Cincinnati*, 2 H. 183.

**Powers.**—They may appoint resident physicians and the city is liable for a reasonable sum for their services. *Ib.*

(2) See note to § 2167 R. S., *supra*.

**Sec. 2167—6 R. S. [Meetings of the trustees; record; report.]** The trustees<sup>1</sup> shall hold meetings according to such rule as they may adopt; they shall keep a record of their proceedings; and four members must concur in any act of the board. They shall annually, on or before the first day of March, make a report to the mayor of the city of Cincinnati of their management of the hospital, its condition and wants, with such information as to the patients therein, and the medical and surgical treatment of them, as said trustees may deem of public interest. [58 v. 151.]

(1) See note to § 2167 R. S., *supra*.

#### 4. INFIRMARIES.<sup>1</sup>

**Sec. 2173 R. S. [Appointment of overseers of the poor.]** The council shall provide by ordinance for the appointment by the mayor, subject to the approval of the council, of such number of persons as may be deemed necessary, not to exceed one in each ward, to act as overseers of the poor,<sup>2</sup> and shall prescribe the duties of such persons in relation to the care of the poor,



and their removal, when necessary, to the infirmary; but such persons shall not receive any compensation for their services: provided, that in cities of the first grade of the first class, the board of infirmary directors<sup>2</sup> may divide such cities into districts, not exceeding six in number, bounded by ward lines, and may appoint one overseer of the poor for each of said districts. Such overseers shall act under the supervision of said board, and shall each serve such length of time not exceeding one year, and each receive such pay, not exceeding six hundred dollars per annum, as said board shall prescribe, and they shall be subject to removal at the pleasure of said board. The said overseers shall have charge of the poor in their respective districts, and shall recommend in writing to the board such assistance as they may deem proper, but shall not themselves be allowed to directly furnish the assistance. Said board shall also have, in addition to the powers conferred by law upon all boards of infirmary directors, the power to appoint a superintendent, clerk, store-keeper, physician, and matron, and to prescribe their duties, fix their terms of office and compensation, and also to remove them at pleasure. [1880, February 25: 77 v. 16, 17; Rev. Stat. 1880; 72 v. 12, § 302.]

(1) **Title, division and chapter.**

—Sections under this heading formed part of Chap. 4, Div. 6, Title XII., R. S. All the sections of this chapter as given in the Revised Statutes are left unrepealed except § 2170 and (2170-1). §§ 2180-1 to 2180-4, inclusive, relating to infirm-ary debts in Cincinnati, are obsolete.

For sections on Infirmaries re-

enacted, see § 141 of the Code, page 351.

**Power to establish and maintain infirmaries** is conferred upon all municipalities in paragraph 16 of § 7 of the Code, page 55.

**Managing board** for infirmaries. *In cities*, see § 141 of the Code, page 351. *In villages*, see § 204 of the Code, page 456.

**Sec. 2174 R. S.** [Duties of infirmary directors in case of partial relief.] Upon complaint being made or information given to the directors,<sup>1</sup> that any person residing in the city is in a condition that requires public assistance or support, said directors shall inquire into the condition and necessities of such person, and if satisfied that relief ought to be granted at public expense, and that such person requires temporary or partial relief only, and that for any cause it would not be prudent to remove such person to the city infirmary, such directors may afford such relief, at the expense of the city, without such removal; and the directors of any city infirmary have the same power of removing paupers settled in some other county in this state which,

by law, is conferred on county infirmary directors. [73 v. 233, § 22.]

(1) See note (2) to § 2173 R. S., *supra*.

**Sec. 2174—1 R. S.** [Lucas county may give outside relief.] In all counties containing a city of the third grade, first class, if the infirmary directors,<sup>1</sup> after making proper investigation in regard to any case brought to their notice, are satisfied that the person or persons are in a condition requiring public relief, and the circumstances in the case are such as to render their removal to the infirmary inexpedient, they may render such other relief as in their judgment is required; and for the purpose of avoiding fraud and imposition and enabling said board to intelligently determine what persons in such city are entitled to public relief; and if there now be in such city a society incorporated under the laws of this state, any part of the purposes or business of which it is to make, inquire into, keep and furnish written reports of the condition and circumstances of persons living within such city, entitled to, or demanding public assistance, or relief, said board of infirmary directors is hereby authorized and directed to enter into contract with such society for making and furnishing to such board, upon its written requisition, reports of said society, upon all such persons within said city and county, demanding of said board public relief; and for the services of such society in making such investigations and reports, said board is hereby authorized to pay to such society not to exceed the sum of two hundred dollars (\$200.00) per month, and the same shall be deemed a part of the legitimate expenses of said board, and be allowed by the county commissioners and auditor and paid as such. [1902, April 15: 95 v. 149.]

(1) See note (2) to § 2173 R. S., *supra*.

**Sec. 2175 R. S.** [Duties of city infirmary directors in case of no legal settlement.] The directors<sup>1</sup> of an infirmary erected and established in any city for the accommodation of its poor, shall not require the directors of the county infirmary of the county in which such city is situated, to receive and provide for persons having no legal settlement within this state,<sup>2</sup> or whose place of residence is unknown, or to charge the commissioners of the county with the expense of providing for such persons in the city infirmary; but the directors of such city infirmary shall furnish relief and support to such persons in said city infirmary, applying therefor the same as county in-

firmly directors are required to do, and have like power of removing such persons as county infirmiry directors have to such other city or county infirmiry where such pauper's legal settlement is; but the provisions of this section shall only apply to counties in which there is a county and a city infirmiry. [73 v. 233, § 23.]

(1) See note (2) to § 2173 R. S., *supra*.

(2) **Legal settlement, how gained.**—Residence for a year of pauper is necessary and it must be open and notorious. *Henrietta Twp. v. Brownhelm Twp.*, 9 O. 76.

But the authorities do not have to be informed; *bona fide* residence is all that is necessary. *Henrietta Twp. v. Oxford Twp.*, 2 O. S. 32.

Residence must be accompanied with the intention to make it the place of abode. *Ib*.

**How lost.**—Settlement is not

lost by residing elsewhere for a year, provided there is an intention to return. *Ib*.

By voting in another state and acquiring a legal settlement there, the former legal settlement is lost. *Crane Twp. v. Antrim Twp.*, 12 O. S. 430.

**Pauper, who is.**—One having credit and no property is not a pauper. *Beach v. Marion Twp.*, 2 W. L. M., 95. But one having property elsewhere, but who is unable to support himself, is entitled to relief. *Ib*.

**Sec. 2176 R. S.** [Concerning orphan asylums in cities of the first and second class.] In all cities in which orphan asylums have been or may be established by law, or as private institutions, the directors<sup>1</sup> of the city infirmiry or other persons having charge of the poor in such cities, may make such arrangements with the trustees or the person having charge of said asylums, for the support and education of all orphan or other children coming under their control by virtue of the laws in force at the time, as they deem proper, and shall allow such compensation as is reasonable and just, to be paid out of the poor fund of such city.<sup>2</sup> [51 v. 412, § 2; S. & C. 891.]

(1) See note (2) to § 2173 R. S., *supra*.

(2) §§ 2177, 2178, 2179, and 2180 R. S. were repealed in 77 O. L., 16. Sections 2180-1, 2180-2,

2180-3, and 2180-4 provided for the payment of certain former debts and warrants against the infirmiry in the city of Cincinnati, and are now obsolete.

## 5. CHILDREN'S HOMES.<sup>1</sup>

**Sec. 2181 R. S.** [Powers of trustees and managers.] In cities of the first and second class, where children's homes or industrial schools may be established under the incorporation law



of the state, the trustees and managers of such institutions may take under their guardianship all children who may be placed under their care and management in either of the following modes:

*First.* Children under sixteen years of age, who are voluntarily surrendered by the father and mother, or in case of the death, or long continued or willful absence of the father, by the mother, or by their guardians, to the care of such trustees and managers, they being by virtue of such surrender invested with the same power over the persons of the children as the parents or guardians.

*Second.* Children under sixteen years of age who, upon the application of the trustees and managers, may be committed to their care by any judge of probate court, or mayor of such city, on account of vagrancy or exposure to want and suffering, or neglect or abandonment by their parents or guardians, or other persons having custody of such children, or in accordance with the request of their mother or next friend in case of the habitual intemperance, abuse, or neglect of their father; and such judge of probate court, or mayor, so committing any child to the care of the trustees and managers, shall annex to the commitment an abstract of the evidence taken by him and on which his adjudication was founded, which evidence shall have been taken under oath. [63 v. 51, § 1; S. & S. 726.]

(1) **Title, division and chapter.** and none are re-enacted by the  
—Sections carried here formed Code.  
Chap. 5, Div. 6, Title XII. R. S. **Aid of children's homes.**—See  
None of these sections are repealed § 929-1 R. S., *supra*, page 609.

**Sec. 2182 R. S.** [May act as guardian of children, and procure them homes.] The trustees and managers shall have the guardianship of such children during their minority, and may, when it may seem proper, place them in suitable homes, having scrupulous regard to the religious and moral character of the persons with whom such children are placed, in order to secure to them the benefits of good example and wholesome instruction, and the opportunity of becoming intelligent and useful men and women. [63 v. 51, § 2; S. & S. 727.]

**Sec. 2183 R. S.** [And may indenture them; record of age, parentage, etc., must be kept.] The trustees and managers shall require an agreement to be entered into, that each and every child so placed shall be furnished with good and sufficient food and clothing and a suitable common school education; the trustees and managers may indenture any such child when

in their judgment it may seem best, and shall provide themselves with books, in which shall be entered the age, parentage, place of residence, and present condition of every child received in any such children's home or industrial school; and they shall also cause to be entered in such books the time when, the place where, and the person to whom any of the inmates of such children's home or industrial school have been placed for suitable homes, or indentured, together with a substantial statement of any contract made between such trustees and managers, and the person receiving such child. [63 v. 51, § 3; S. & S. 727.]

**Sec. 2184 R. S. [Assignment of services and cancellation of contracts.]** Any person receiving such child from the trustees and managers of such institution, shall not assign or transfer his services for any period without the written consent of the trustees and managers; and if, for any cause, a person so taking charge of a child, desires to be released from the contract, the trustees and managers, upon application, may cancel the same, and resume the charge and management of the child, and shall have the same power and authority over him as before the agreement was made. [63 v. 51, § 4; S. & S. 727.]

**Sec. 2185 R. S. [Trustees may remove children from unsuitable homes.]** The trustees and managers may remove a child from a home when, in their judgment, the same has become an unsuitable one, and they shall, in such cases, resume the same power and authority as they originally possessed; but they may return a child to parents or a surviving parent or guardian, or when they believe the child to be capable of caring and providing for himself, may discharge him to his own care. [63 v. 51, § 5; S. & S. 727.]

## 6. SOLDIERS' RELIEF.

Sec. 3107—1 R. S. [Bounty for re-enlisted veteran volunteers.] <sup>1</sup> The commissioners of the several counties, the trustees of the several townships, and the city council of the several cities of this state, are hereby authorized and required to issue to each re-enlisted veteran volunteer <sup>2</sup> who has heretofore been credited, as shown by the muster and descriptive rolls, or otherwise, upon the quota of such county, township, or city, or any ward of such city, under any requisition of the president of the United States for volunteers during the late rebellion, and who has not received any local bounty upon said enlistment, a warrant for the sum of one hundred dollars, or a bond for a like sum bearing six per cent. interest, redeemable at the pleasure of such commissioners, trustees, city councils, one year after the date thereof; and when such veteran volunteer has been credited upon the quota of the state at large, or has been so indefinitely credited as that the credit could only pass to the state as shown by the muster and descriptive rolls, then the auditor of state is hereby authorized and required to issue his warrants upon the state treasury to such volunteer for the sum of one hundred dollars, which shall be paid by the treasurer of state out of any funds in the treasury not otherwise appropriated; and in all cases where such volunteer has received a bounty of less sum than one hundred dollars on such enlistment, then it shall be the duty of the state auditor, county commissioners, township trustees, or city councils, as the case may be, to issue a warrant, or bond, as above specified, to such volunteer for the difference between the amount already received, and the amount he would by this act be entitled to receive, if he had not received any such bounty. To determine the number of those credited to congressional districts, that properly belong to each county of the district, the adjutant-general is hereby required to apportion, among the several counties of each district, the number so assigned, in proportion to population, and notify the county commissioners of the number assigned to their several counties; the commissioners shall then proceed as required in this section; provided, that any county having previously paid the bounty to any volunteer credited to the congressional district, shall deduct the amount so paid from the amount to be levied on said county; provided, however, when the muster and descriptive rolls were not received by the



adjutant-general in time for the credit therein shown to be applied upon any quota, then the auditor of state shall issue his warrant on the state treasury in favor of such soldier, as in the case of credits to the state at large. And in all cases where the commissioners of any county, the trustees of any township, or the council of any city, in this state, has promised to any volunteer, under any requisition of the president, a bounty, and such volunteer has received from such county, township, or city, in settlement of such a bounty, or any part thereof, any bond, certificate, scrip, or promise to pay, in writing, by the provisions of which payment was to be made, in case any subsequent legislation should authorize such commissioners, trustees, or council to levy a tax for the payment of the same, and such bond, certificate, scrip, or promise in writing has not been paid for want of such authority by the legislature, or for any other reason, and said bond, certificate, scrip, or promise in writing, has not been by such volunteer sold or assigned, then such commissioners, trustees, or council shall issue to such volunteer, or in case of his death, then to his legal representatives, a warrant for the amount of said bond, certificate, scrip, or promise in writing, together with the interest thereon from the date of issue thereof, or a bond for a like sum, redeemable as herein provided; and in case of the loss or destruction of said bond, certificate, scrip, or promise in writing, the person entitled thereto shall make affidavit of said loss or destruction, and that the same has not been sold or assigned before such person shall receive said warrant or bond as aforesaid; provided, that this act shall not be construed so as to allow any such re-enlisted veteran volunteer who has already received the bounty provided for by the act to which this is amendatory, or who has received one hundred dollars bounty from the state, or any county, township, or city under any prior act; nor shall lapse of time or state equities be set up as a defense to any claim made under this act, or of any act to which this is amendatory,<sup>3</sup> or any act relating to this subject, and where said trustees of townships, city councils or county commissioners have not issued said bond, certificate or promise in writing, to such re-enlisted veteran volunteer, they are hereby required to do so. Nor shall it apply to actions now pending in court. [1889, April 3: 86 v. 193; 77 v. 294; Rev. Stat. 1880; 64 v. 231 (S. & S. 478).]

(1) **Validity.**—The act of April 6, 1866, providing for the payment of bounties was held constitutional. *State v. Comm'rs* 17 O. S. 608; *State v. Richland Tp.*, 20 O. S. 362.

(2) **"Re-enlisted veteran volunteers"** under the act of April 16, 1880, did not include "veteran volunteers" who at the time of their enlistment were not in the field as veteran volunteers. *State v. Oglevie*, 36 O. S. 394.

(3) **Limitation.**—There is in this state, no statutory limitation

as to the time within which a writ of mandamus may be obtained, and a demurrer to an answer setting up statute of limitation of six years, was sustained. *Chinn v. Trustees*, 32 O. S. 236.

A right of action given by a statute, and existing at the time of the amendment or repeal of the statute, is not affected by the amendment or repeal, unless otherwise expressly provided in the amending or repealing act. *State v. Washington Tp.*, 24 O. S. 603.

**Sec. 3107—2 R. S. [Or the families of those who have died.]** If any such veteran volunteer shall have died before receiving the bond or warrant to which he would have been entitled under the first section [§ (3107—1)] of this act, it shall be given as follows: First, to his widow; if no widow, then to his children; if no children, to his mother; if no mother, to his father; if no father, to dependent brothers and sisters, of less than fifteen years of age; but no money shall, by this act be paid to any one who has deserted the military service, or has at any time left the state to evade or escape the draft. [64 v. 231; S. & S. 478.]

**Sec. 3107—3 R. S. [Bonds, how executed.]** Said bonds, when issued by the county commissioners, shall be signed by the commissioners, countersigned by the county auditor; when issued by the trustees of any township, shall be signed by the trustees, and countersigned by the clerk of the township; and when issued by city councils, shall be signed by the president and countersigned by the clerk of such council, and, as soon as practicable, delivered to said volunteers, or the parties aforesaid, in the order named. [64 v. 231; (S. & S. 478).]

**Sec. 3107—4 R. S. [Tax to pay same.]** For the purpose of paying said bond or warrants, the county commissioners of any county, the trustees of any township, and the city council of any city, issuing the same, shall levy such tax each year after issuing the same, as may be required to pay one-third of the amount of each warrant or bond with interest; and said levy shall be certified to the auditor of the county, and shall be entered upon the duplicate and collected as other taxes, and the money raised thereby for the several counties, shall be re-

tained in the county treasuries, and that collected for the several townships and cities shall be assigned to such townships and cities, and paid out by said several authorities as other funds are required to be paid out in said bonds: provided, that the commissioners of any county, trustees of any township, or city council of any city, may, if they deem the same expedient, levy a larger amount in any one year than would be sufficient to pay one-third of the bonds or warrants so issued. [64 v. 231; S. & S. 478.]

**Sec. 3107—5 R. S. [Construction of act amended.]** Section *one* of the above recited act to which this act is supplementary, shall be held and construed so as to include within its terms and provisions the same benefits to be given to re-enlisted veteran non-commissioned officers and soldiers of the United States regular army as to state volunteers, where such men of the regular army are shown to be credited as required by said act to which this act is supplementary. [66 v. 65.]

**Sec. 3107—6 R. S. [Evidence in bounty cases.]** The certificate of the adjutant-general of the state of Ohio, when it appears from the records of his office that the applicant reënlisted in the service of the United States, specifying dates and the locality to which the applicant was credited, shall be taken, for all purposes under the act to which this is supplementary, as *prima facie* evidence of his having reënlisted, as and of his being a veteran volunteer within the meaning of said act, and of his having been credited, as required to be shown by said act, upon such reënlistment, to the county, township, city, or ward of the city named in said certificate, and upon the quota thereof under a requisition of the president of the United States for volunteers during the late rebellion. [90 v. 64; 82 v. 119.]

**Sec. 3107—7 R. S. [Value of certain documents as evidence.]** The papers, documents, books and records on file or deposited in the office of said adjutant-general, or the office of the adjutant-general of the United States, shall, for all purposes under said act, be admissible in evidence, and such papers, documents, books and records, or any transcript, copy, statement or abstract of the same, or any part thereof, certified to be such by said officer in whose office said originals shall thus be on file or deposit, or his assistant under the seal of such officer or office, shall be competent and *prima facie* evidence of the facts and matters therein contained, so far as the same may be pertinent to the issue or claim. [90 v. 64; 82 v. 119.]



**Sec. 3107—8 R. S. [Application of two preceding sections.]**

The provisions of this act shall apply to all such transcripts, copies, statements or abstracts heretofore or hereafter thus made and certified, and to all proceedings or actions now pending or hereafter brought, under the provisions of the act to which this is supplementary, or any previous act or acts upon the same subject, or any such act hereafter passed while this act shall remain in force. [90 v. 64; 82 v. 119.]

**Sec. 3107—48 R. S. [Preference of appointment in public service to be given to honorably discharged soldiers and sailors.]**

In every public department, and all public departments in all municipal corporations, and upon all public works of the state of Ohio, honorably discharged soldiers, sailors and marines of the United States shall be preferred for appointments and employment; age, loss of limb or other physical impairment, which does not, in fact, incapacitate, shall not be deemed to disqualify them; provided, however, that the applicant shall have been a resident of the county in which the office or position is located, for at least one year, and possesses the other requisite qualifications.<sup>1</sup> [94 v. 157; 92 v. 50; 85 v. 149.]

(1) **Mandamus does not lie.**— *ex rel.* v. Comm'rs, 57 O. S. 86;  
The provisions of this act cannot be enforced by mandamus. State Brady v. French, 6 N. P. 127.

**Sec. 3107—49 R. S. [Penalty.]** Any violation of the provisions of this act shall be deemed a misdemeanor, and upon conviction in any court of competent jurisdiction, shall be punishable by a fine of not less than fifty dollars (\$50.00) and not more than one hundred dollars (\$100.00). [92 v. 50.]

For act relating to Soldiers' relief committees in counties, some members of which are appointed from wards in cities, see §§ 3107-51 to 3107-54 R. S., inclusive.

## V

WATER WORKS.<sup>1</sup>

Sec. 2411—1 R. S. [Purposes for which water rents may be assessed and collected in Cincinnati.]<sup>2</sup> In cities of the first grade of the first class, for the purpose of paying the expenses of conducting and managing the water works; and to provide for paying the expenses of making all betterments, enlargements and improvements of the works, including the building of machinery, buildings, tanks, towers, reservoirs, or any other water works appliances, or the repair of the same, or of the extensions of the works and reservoirs, or any additions thereto, or the laying, extending or enlarging of the water mains; and to provide for the payment of the interest of any loan heretofore or hereafter made for the purchase, lease, construction, improvement, betterment, enlargement or extension of any part of the water works system of such city, or for the creation of a sinking fund for the liquidation of the debt heretofore or hereafter made for any of these purposes; and to provide for the payment of the interest and the creation of a sinking fund for the payment of any renewal or extension bonds heretofore or hereafter issued, in lieu of water works bonds which may have matured, or which may mature, and for the payment of which no provision may have been made at the time of their maturity, and notwithstanding ordinances authorizing such renewal or extension bonds may provide for the payment of the interest and the creation of a sinking fund therefor, by taxation; and to provide for the payment of the interest and the creation of a sinking fund, for the payment of bonds heretofore or hereafter issued, for water works purposes, or for the purpose of laying water mains, by villages which have already been or which may hereafter be annexed to any such city, and notwithstanding that such bonds may have been issued under acts requiring the payment of the interest thereon, or the creation of a sinking fund therefor, by taxation; and to provide for the payment of any contract obligations hereafter entered into by the board, or any other authorized board, hereinafter referred

to with any person, company or corporation, their successors or assigns, for the construction of water works, or additions, enlargements, improvements or extensions to the water works; and to provide for the payment of any contract obligations hereafter entered into by the board hereinafter referred to or any other authorized board, with any person, company or corporation, their successors or assigns, for the lease of water works, or additions, enlargements, improvements or extensions to the water works; and to provide for the payment of any land, turnpike, highway or franchise of any description, or any easement or interest in any of the same, which may be necessary at any time for the purpose of extending, enlarging or improving the water works, or making additions thereto; the board having charge of the water works of such city, shall have the power to assess and collect, from time to time, a water rent of sufficient amount, in such manner as it deems most equitable upon all tenements and premises supplied with water, and where more than one tenant or water taker is supplied with water from one hydrant, or off the same pipe, and when the assessments therefor shall not be paid when due, the board shall look directly to the owner of the property for the entire rent, or so much thereof as remains unpaid for water furnished said premises, to be collected in the same manner as other city taxes. [92 v. 605.]

(1) **Sections on water works.**

Sections carried under this heading formed part of Chap. 1, Div. 8, Title XII. R. S. Of the sections in this chapter, §§ 2409, 2410, 2411, 2412 to 2417, inclusive, 2418 to 2423, inclusive, 2425 to 2435 inclusive are incorporated in § 205 of the Code, which see; §§ (2435-1) to (2435-18), inclusive, the Cincinnati Water Works act, are mentioned in § 215; these latter sections are carried here. All other sections, (except §§ (2411-1) and 2424, which are carried here) are repealed by the Code.

**Power to establish and maintain water works** is conferred upon all municipalities in paragraph 15 of § 7 of the Code, page 54; and

power to appropriate property for water works purposes is given in § 10 of the Code, page 81.

**Power to contract with company** for furnishing water to municipality see § 45 of the Code, page 173, and § 3551 R. S., under GAS AND WATER COMPANIES, *infra*.

(2) **Validity.**—This act was held valid in *Alter v. Cincinnati*, 56 O. S. 47.

**Power to apply water rents** to betterments and extinguishment of debt, given in this section to Cincinnati, is conferred upon all municipalities in paragraph 15 of § 7 of the Code, page 54.

**Section construed.**—See *Ramsey v. Columbus*, 12 Dec. 725.



**Sec. 2424 R. S.** [Water works in contiguous cities and villages, construction and regulation thereof.] Such aqueducts<sup>1</sup> and pipes shall be so constructed and laid as not to interfere, unnecessarily, with the use of such streets, alleys, and public grounds, as public highways and public grounds; and the city or village so establishing any part of its water works within the limits of such other city or village shall have jurisdiction to prevent or punish any pollution of, or injury to the water so conveyed, or of the stream or source from which the same is obtained, or any injury to any portion of the water works so located within the limits of such other city or village. [66 v. 203 (208), § 351; (S. & C. 1538).]

(1) See § 2423 re-enacted in § 205 of the Code, page 465.

*Cincinnati Water Works Act.*<sup>1</sup>

**Sec. 2435—1 R. S.** [Water works commission for Cincinnati.]<sup>2</sup>  
 § 1. Whenever in any city of the first grade of the first class, the board of administration if there be one, and if not, the board having charge of the water supply of such city shall, by a resolution passed by a majority of the members thereof, declare that it is necessary to provide water works for such city, if there be no existing water works, or shall declare that a material enlargement, extension, improvement or addition to the existing water works of such city is required, if there be existing water works of such city, it shall certify such resolution to the governor of the state, and thereupon it shall be his duty to appoint a board of trustees to be known as the "commissioners of water works," composed of five citizens, residents of such city, not more than three of whom shall belong to the same political party. All vacancies in the office of commissioner shall be filled in the same manner as the original appointment, but so that not more than three of such commissioners, when such vacancy shall have been filled, shall belong to the same political party. [92 v. 606.]

(1) **The Cincinnati water works act** is explicitly left in force by § 215 of the Code, page 481.

For special act authorizing commissioners to borrow additional \$1,500,000, see 97 O. L. 620.

(2) **Validity.**—The entire act, except § 8, was held constitutional in *Alter v. Cincinnati*, 56 O. S. 47.

**Investigation and plans.**—It was held under a former act that the old board of administration could employ engineers to investigate needs and submit plans. *Cincinnati v. Cincinnati*, 11 C. C. 309.

**Railway through grounds,** power of commissioners to grant right for, see *Ampt v. Cincinnati*, 15 Dec. 237; 2 N. P. (N. S.) 489.

**Sec. 2435—2 R. S.** [Bond; salary; must not be interested in contracts made by board.] § 2. Each of said commissioners

shall enter into bond to the city, with at least three sureties to the satisfaction of the mayor as to the sufficiency, and of the corporation counsel as to form, in the sum of one hundred thousand (\$100,000) dollars, conditioned for the faithful discharge of his duties; and the bond so taken shall be deposited with the treasurer of the city for safe keeping. Each of said commissioners shall receive as compensation for his services, four thousand (\$4,000) dollars per annum, which shall be paid out of the fund hereinafter created, or by the contracting parties hereinafter provided for. No commissioner, or person holding appointment under said commissioners, shall be interested directly or indirectly, in any contract entered into under the provisions of this act. Any commissioner may be removed for misfeasance, malfeasance, or nonfeasance in the manner provided for the removal of certain officers in chapter 3, division 4, of title 12, of the Revised Statutes of Ohio, and the acts that may be passed amendatory and supplementary thereto. [92 v. 606.]

**Sec. 2435—3 R. S. [Apportionment; duties.]** § 3. The governor may appoint as one of the said five commissioners, a member of the board of administration of such city; if there be such a board and if such appointment be made, such commissioner shall give the same bond as required by section 2 [§(2435—2)] of this act, and shall receive as compensation the sum of two thousand (\$2,000) dollars per annum. The duties imposed upon such commissioner and the compensation paid to such commissioner, shall be in addition to the duties and compensation of such commissioner as a member of said board of administration; and the duties of such commissioner, as a member of the board of administration, as provided by law, shall not be construed as being in conflict with the duties of such commissioner, under the provisions of this act. [92 v. 606.]

**Sec. 2435—4 R. S. [Organization.]** § 4. Said commissioners shall form a board, and shall choose one of their number president, and a majority of said board shall constitute a quorum to transact business. Said board shall hold regular meetings at such time and places as it may agree upon, and special meetings under such regulations as it may prescribe; and shall cause to be kept a full and accurate account of its entire proceedings, including an account of its receipts and expenditures, if any, and make a report of such receipts and expenditures, annually to the mayor and board of legislation of such city. [92 v. 606.]

**Sec. 2435—5 R. S.** [Commissioners to take up plans, surveys, etc.] § 5. Said commissioners are authorized to take up and consider the surveys, plans and specifications, if any, theretofore made or devised for water supply, and they may cause such additional investigations, surveys, plans and specifications to be made, as they may deem necessary, and after consideration thereof, they may adopt definite plans and specifications providing for the construction of such works, if there be none existing, or for an enlargement, extension, improvement or addition to existing water works, either within or without the limits of the city or state, including reservoirs, buildings, tunnels, pumping engines and machinery of all kinds, pipes, and other fixtures, appliances or facilities, as, in their opinion, are necessary to secure an abundant supply of pure and wholesome water; and said commissioners may also determine the location of any of such enlargements, extensions, improvements or additions. [92 v. 606.]

**Sec. 2435—6 R. S.** [Purchase or condemnation.] § 6. Said commissioners are authorized to acquire by purchase or by the proceedings hereinafter mentioned, on behalf of such city, all real and personal property and franchises necessary for the proper construction of water works, if there be none existing, and for the enlargement, extension, improvement, or addition to existing water works; and whenever, for such construction or the completion of any part or parts of such enlargements, extensions, improvements or additions, it shall be necessary to use or occupy any street or other public way, space, park or ground, or any part thereof, belonging to such city, or to cross any stream under the control of the state, said commissioners may take and use or occupy the same on behalf of the city for such purposes; and whenever it shall be necessary, in the opinion of said commissioners, to appropriate any land, turnpike, highway or franchise of any description, or any easement or interest in any of the same, in order to carry out the purposes set forth in this act, either within or without the limits of such city, or, whenever, for like reason, it shall be necessary, in the opinion of said commissioners, to appropriate land for the foundations or abutments of piers across any stream within this state, said commissioners are authorized to commence and conduct, in the name of such city, proceedings therefor, under and according to chapter 3, division 7, title 12, of the Revised Statutes,<sup>1</sup> and the acts amendatory and supplementary thereto, and no concurrent action of any board or officer shall be necessary; and all the powers with respect to such proceedings that are now vested



in any other board or officer, shall be vested also in and may be exercised by said commissioners. [92 v. 606.]

(1) **Appropriation proceedings.**      referred to are now superseded by §§  
— The chapter, division and title      10 to 22 of the Code, inclusive.  
of the Revised Statutes here re-

**Sec. 2435—7 R. S. [As to making of contracts.]** Said commissioners, in constructing such works, or such enlargements, extensions, improvements or additions, shall also have power and authority and be governed in respect of contracts as follows:

First — To make contracts, employ such superintendents, engineers, clerks, laborers and other employes, as they may deem necessary, and to fix their compensation; and any of such persons may be removed by a majority of said commissioners at any time. No contract which said commissioners shall enter into, or modification thereof, shall be valid until assented to at a regular or special meeting and concurred in by a majority of all the members, and such assent entered on the minutes of their proceedings.

Second — No money shall be expended on account of plans, specifications, drawings, construction or equipment of the water works herein provided for, or any other expense connected therewith, unless first authorized by said commissioners, and upon vouchers, signed by their president and clerk, upon the auditor, or other auditing officer, if there be no auditor of such city, to be paid by the treasurer of such city, upon the warrant of the auditor or other auditing officer, if there be no auditor, out of the funds hereinafter provided. Said commissioners shall, before entering into any contract, cause plans and specifications, detailed drawings and forms of bids to be prepared, and careful estimate of cost to be made; and when adopted by them, they may, in their discretion, cause the plans and drawings to be multiplied and printed, by photographing, lithographing or other suitable process, and the specifications and forms of bids, contracts and bonds to be prepared, and have the same printed for distribution among the bidders.

Third — All contracts shall be made in writing, in the name of such city and signed by the president and clerk of said commissioners and by the contractor. Whenever it becomes necessary in the opinion of said commissioners, in the prosecution of said work, to make alterations or modifications in any contract, such alterations and modifications shall only be made by order

of the commissioners; and such order shall be of no effect until the price to be paid for the work or materials, under such altered or modified contract, has been agreed upon in writing, and signed by the contractor and a majority of the members of said commissioners; and no contractor shall be allowed or recover any thing for work or materials, caused by any alteration or modification, unless an order is made or agreement signed as aforesaid; nor shall he in any case be allowed or recover more for such work and materials than said agreed price; and if, when the commissioners have ordered an alteration or modification of contract, the contractor and the commissioners can not agree upon the price to be paid for work or materials, under such altered or modified contract, they shall submit the matter to arbitration, the commissioners choosing one arbitrator and the contractor one, and these two a third; and the award of such arbitrators, or a majority of them, as to the price to be paid, shall be made in writing and entered on the minutes of said commissioners, and when so entered shall be binding on both parties.

Fourth — If a contract, agreement or order, made or authorized by said commissioners be found to violate any of the provisions of this act, it shall at once become void and of no effect; and no money shall be paid or recovered for service rendered or materials furnished thereunder.

Fifth — Said commissioners shall not enter into any contract for work in the construction and completion of said water works system, without first causing thirty days' notice to be given in one of more newspapers of general circulation in such city, that sealed proposals will be received for doing the work or furnishing the materials, provided that said commissioners may procure plans therefor in the manner indicated in section 5 [§(2435—5)] of this act, and shall not be required to advertise for bids for making or printing the drawings, specifications and forms of bids, contracts and bonds.

Sixth — In all cases of competitive bidding, whether in the construction or completion of, or furnishing equipments for such water works system, no bid shall be received or considered by said commissioners which covers a patented material, process or device, until the person who owns or controls the patent or has a contract for the exclusive use of such patented material, process or device, has entered into a written agreement with the said commissioners for the benefit of all bidders, whereby the lowest price shall be fixed at which the owner of such patent, or patented articles will furnish to said commissioners, or which

he will furnish to all bidders such patented material, process or device.

Seventh — All bids shall be enclosed in a sealed envelope and deposited with the clerk of said commissioners; and such sealed envelopes shall have endorsed thereon the nature of the same and the name of the bidder; and all bids shall be opened at a regular meeting of the commissioners, and at an hour to be indicated in said notice. Each bid shall be accompanied with a bond in a sum to be fixed by said commissioners, signed by sufficient sureties, for the acceptance of the contract, if awarded by the commissioners; or the bidder may deposit with the commissioners, in lieu of such bond, a certified check or bank certificate of deposit, payable to the order of said commissioners; or cash equal in amount to the bond as above required; and, in case of refusal by the bidder to whom the award is made to enter into contract according to his bid, within such reasonable time, as the commissioners may determine, said bond shall be put in suit, and the amount collected paid into the fund hereinafter provided; or, if a check, or certificate of deposit, or cash is deposited, the amount shall be immediately paid into such fund.

Eighth — Said commissioners shall enter into contract with the lowest and best bidder,<sup>1</sup> upon his giving bond to such city, with sureties as the commissioners shall approve, that he will perform the work and furnish the materials in accordance with his contract, and that the sureties agree in advance to such modifications and alterations as may be made by said commissioners and the contractor, within the limits of the penal sum mentioned in the bond; and on the failure of such bidder, within a reasonable time, to be fixed by the commissioners, to enter into bond with the sureties before provided, a contract may be made with the next lowest and best bidder, and so on, until a contract is effected with a contractor giving bond as aforesaid; provided, that the commissioners may let the work in whole or in parts, and may receive bids for labor and material separately, as it may deem best, and may reject any and all bids. Should a contractor fail, from any cause, to complete the work contracted for by him, said commissioners shall relet the unfinished part of said work or complete the same by days' work or otherwise, as may be for the best interests of the city in the judgment of said commissioners, and shall charge the cost of completion to the contractor. [92 v. 606.]

(1) **Discretion of board.**— This authority to make a contract "with section which confers on the board the lowest and best bidder," confers



upon the board a discretion with respect to awarding the contract which cannot be controlled by mandamus. State *ex rel.* Walton v. Hermann, 63 O. S. 440; Coppin v.

Hermann, 6 N. P., 452; 7 N. P. 6; aff'd, 63 O. S. 572.

Board has no power to relinquish rights secured to the city by contract. New York & B. Co. v. Hermann, 27 C. C. 694.

**Sec. 2435—8 R. S.** [If inexpedient to proceed under section seven then board may contract with any person, etc., for construction, etc., of works.]<sup>1</sup> § 8. [92 v. 606.]

(1) **Held unconstitutional**, because it empowered union of city property with enlargements to be built and owned by others and

leased to the city, and conveyance by the city of property to such others. Alter v. Cincinnati, 56 O. S. 47.

**Sec. 2435—9 R. S.** [Expenses.] § 9. All expenses that may be incurred by said commissioners up to the time that any contract may be entered into as provided by [in] section 8 [§(2435—8)] of this act or until the issue and sale of any bonds hereinafter provided for may have been consummated, shall be paid out of the water works fund of such city, by the board having charge of the water supply of such city, upon vouchers drawn and approved by said board, but all such sums so paid shall be reimbursed to the said water works fund, either by the contracting parties hereinbefore mentioned, or out of the proceeds of the sale of bonds hereinafter provided for. [92 v. 606.]

**Sec. 2435—10 R. S.** [Fund for payment.] § 10. To provide a fund to pay the cost and expenses contemplated by this act, the said commissioners are hereby authorized to borrow, from time to time, as money may be needed, in behalf of such city, an amount not to exceed six million five hundred thousand (\$6,500,000) dollars, and to issue bonds therefor in the name of such city, under the corporate seal thereof. Such bonds shall be designated "water works bonds" of such city, shall be signed by the president of said commissioners of water works, and attested by the auditor of the city, or other auditing officer, if there be no auditor, and shall bear such interest, not exceeding four per centum per annum, and be payable at such times and places, and in such amounts as said commissioners may determine. Said bonds shall be sold, as provided by law, and as a security therefor, upon the sale thereof, a lien shall arise in favor of the bond-holders upon the water works property then owned and thereafter acquired by such city, except as hereinafter provided for, and upon the net income of the water works, and said bonds shall be further secured by a pledge of the faith and credit of such city. [92 v. 606.]

**Sec. 2435—11 R. S. ["Water works improvement fund."] § 11.** The moneys arising from the sale of said bonds shall be deposited with the city treasurer as a fund to the credit of said commissioners of the water works, and shall be called the "water works improvement fund"; and of this fund said commissioners shall be the sole trustees and shall have full control and disbursement of the same. No part of said fund shall be diverted to any other use or purpose than that specified in this act. All warrants drawn upon the auditor or other auditing officer, if there be no auditor, for payment out of said fund, shall designate on their face, "for reimbursement" (as provided for in section 9), [§(2435—9)] "for plans," "for specifications," "for construction," "for equipment," according as they are drawn for the one purpose or the other, and a careful account of the condition of said fund shall be separately kept by the auditor of said city, or other auditing officer, if there be no auditor. [92 v. 606.]

**Sec. 2435—12 R. S. [When works completed management surrendered by commissioners.] § 12.** Whenever the water works or the enlargement, extension, improvement or addition to existing water works are completed as contemplated under section 7 [§(2435—7)] of this act, control of the same shall be surrendered by said commissioners to the board having charge of the water supply of such city; provided, that whenever in the judgment of said commissioners any portion of such improvement is completed so that the same can be surrendered without impeding or embarrassing other portions of said improvements, the same may be surrendered to the board having charge of the water supply of such city. [92 v. 606.]

**Sec. 2435—13 R. S. [Property not needed may be sold.] § 13.** Whenever any property, both real and personal, occupied and used for water works purposes in such city, shall not be required for such purposes, by reason of the enlargement, extension, improvement or addition as herein provided for, the board having charge of the water supply of such city shall have power, after giving thirty days' notice by advertisement in one or more newspapers of general circulation in such city, to sell the same on sealed proposals, to the highest and best bidder therefor. And the lien hereinbefore created for the security of the bonds hereinbefore authorized shall be transferred to the proceeds arising from the sale of such property; and such proceeds shall be placed to the credit of the sinking fund hereinafter provided, for the final redemption of the bonds issued under the provisions of this act. [92 v. 606.]

**Sec. 2435—14 R. S. [Unexpended funds shall be placed to credit of sinking fund.]** § 14. Upon the completion of any water works, or the enlargement, extension, improvement or addition provided for in this act, whether the same be under section 7 [§(2435—7)] or section 8 [§(2435—8)] thereof, the term of office of the commissioners and the employment of their several employes shall cease, and any unexpended funds shall be placed and kept to the credit of the sinking fund provided for by this act; and thereupon, the control and management of said water works, if constructed under section 7, [§(2435—7)] shall pass to and vest in the board having charge of the water supply in such city, and the obligations entered into by said commissioners under section 8, [§(2435—8)] if any, shall be assumed and performed by the said board having charge of the water supply, the expense thereof to be paid out of the revenues of the water department after assuming control of the works herein provided for. The board having charge of such water works shall not thereafter be permitted to create any debt or liability for any of the purposes for which they are authorized to assess water rents, including all obligations incurred under the provisions of this act, that cannot be met and paid from the income of the water works department for that year; and all debts created in violation of this provision shall be absolutely void; nor shall the board of legislation create any debt or borrow any money for the use of the water works of such cities. [92 v. 606.]

**Sec. 2435—15 R. S. [Interest on bonds.]** § 15. The interest becoming due on the bonds which may be issued under the provisions of section 10 [§(2435—10)] of this act, shall be paid pending the construction of said works out of the proceeds of the sale of such bonds, unless the board having charge of the water supply of such city, agrees to assume the same or any portion thereof, during the construction of such works, out of the proceeds of the revenues of the water department, and in that case such board shall be permitted to do so. The interest becoming due on the bonds which may be issued under the provisions of section 10 [§(2435—10)] of this act, after the completion of the work herein authorized, and after the control of the same has been surrendered to the board having charge of the water supply of such city, shall be paid by such board each year out of the revenues of the water department. [92 v. 606.]

**Sec. 2435—16 R. S. [Bonds.]** § 16. For the purpose of providing a sinking fund for the final redemption of any bonds



which may be issued under section 10 [§(2435—10)] of this act, the board having charge and control of the operations of the water works of such city, and the collection of the revenue therefrom, shall make semi-annual payments from the net revenues of such water works to the sinking fund, commencing the sixth year after the appointment of the commissioners provided for in section one [§(2435—1)] of this act, of not less than seventy-five thousand (\$75,000) dollars per annum, until said bonds are paid, or an adequate fund provided for the final redemption of the same; and said yearly sums, together with their earnings and other payments hereinafter provided for, shall be invested in accordance with law by the sinking fund trustees of such city; or if there be no trustees of the sinking fund, then by the board or officer or officers having charge of the sinking fund of such city, solely for the benefit of the sinking fund for the final redemption of said bonds. [92 v. 606.]

**Sec. 2435—17 R. S. [No member individually liable.]** § 17. No member of said commissioners shall be individually responsible to any contractor or employe upon any contract or employment made in pursuance of this act, nor to any person upon any claim occasioned by any act or default of any person contracted with or employed in pursuance of this act. [92 v. 606.]

**Sec. 2435—18 R. S. [Non-applicability of certain sections.]** § 18. The provisions, restrictions and limitations of sections 2690*h*, 2690*i*, 2690*j*, 2699 and 2702 of the Revised Statutes <sup>1</sup> shall not apply to the commissioners appointed under this act, in the prosecution of the work, or the contracts herein provided for. [92 v. 606.]

(1) **New code provisions.**—The provisions see §§ 35, 38, 43 and 45 of the Code.  
sections here referred to are repealed by the Code. For similar

## VI

LIGHTING AND WATER COMPANIES;  
MUNICIPAL LIGHTING PLANTS.<sup>1</sup>

**Sec. 2478.** [Council may regulate price of electric light, gas or water.] The council of any city or village in which electric lighting companies, natural or artificial gas companies, or gas light or coke companies, or companies for supplying water for public or private consumption, may be established, or into which their wires, mains or pipes may be conducted, are hereby empowered to regulate from time to time, the price which said electric lighting,<sup>2</sup> natural or artificial gas, gas and coke companies, or companies for furnishing water for public or private consumption, may charge for electric light, or for gas for lighting or fuel purposes, or for water for public or private consumption, furnished by such companies to the citizens, public grounds, and buildings, streets, lanes, alleys, avenues, wharves, and landing places, or for fire protection; and such electric lighting, natural or artificial gas, gas light or coke companies or companies for furnishing water for public or private consumption, shall in no event, charge more for any electric light, or natural or artificial gas, or water, furnished to such corporation or individuals, than the price specified by ordinance of such council; and such council shall also have power to regulate and fix the price which such companies shall charge for the rent of their meters,

[May require meters to be furnished without extra charge.] and may, in the ordinance regulating the price which such companies may charge for electric light, gas or water, provide that such price shall include the use of meters to be furnished by such companies, and in such case meters shall be furnished and kept in repair by such companies and no separate charge shall be made, either directly or indirectly, for the use or repair of the same. [1906, April 14, 98 v. 170; 97 v. 114; 86 v. 62; 84 v. 39; 66 v. 218.]

(1) **Sections on gas companies and municipal gas works.**—Sections of the Revised Statutes carried here formed part of Chap. 3, Div. 8, Title XII., R. S. All sections of the chapter not carried here are repealed by the Code. § 2491 is referred to in § 45 of the Code.

**Power of municipality to establish and maintain lighting,**

power and heating and natural gas plants, see paragraph 15, § 7 of the Code, page 54.

Power of municipality to appropriate property for such purpose, see § 10 of the Code, page 81.

Power of municipality to contract for lighting the streets, etc., see § 45 of the Code at page 172.

(2) **Power to regulate.**—Where the right has been reserved to alter or amend charter, a general law may be passed authorizing cities to regulate the price of gas. *State ex rel. v. Cincinnati G. L. & C. Co.*, 18 O. S. 262.

A company chartered under the old constitution, unless empowered by charter to fix prices, comes within the provisions of this section. *Zanesville v. Gas Light Co.*, 47 O. S. 1.

A company whose pipes extend into another city or village, is subject to the regulations of such city or village under the authority of this section. *Cincinnati G. L. & C. Co. v. Avondale*, 43 O. S. 257.

Municipality is not deprived of its power to regulate, because it has passed an ordinance allowing a gas company to lay pipes in the street, the company agreeing not to charge more than a certain price for gas. *State ex rel. v. Cleveland, etc., Co.*, 3 C. C. 251.

The ordinance allowing pipes to be laid is not a contract. *Ib.* Where no contract has been made with a company, fixing the price of gas, the municipality may regulate the price of gas, and make changes at any time. *State ex rel. v. Gas Co.*, 37 O. S. 45.

But if a contract has already been made and the company has accepted the terms of an ordinance fixing the price of gas, the contract cannot be changed. *Toledo v. N. W. Ohio Nat. Gas Co.*, 5 C. C. 557.

Where municipality has fixed the price for lighting for ten years, under § 2479 R. S., *infra*, its power to regulate after such period is not affected. *State ex rel. v. Gas Co.*, 37 O. S. 45. See further, note (1) under § 2479 R. S., *infra*.

An ordinance regulating gas companies, and referring to "any gas

companies" is broad enough to cover companies organized for furnishing natural gas. *Cline v. Springfield*, 7 N. P. 626.

As to effect of company chartered to furnish artificial gas, substituting natural gas therefor, see *Findlay Gas Light Co. v. Findlay*, 2 C. C. 237.

**Scope of regulation.**—Council has no power to compel a gas company, without its assent to the ordinance, to furnish gas in a manner and at a rate at the option of the consumer. *Gas & Fuel Co. v. Chillicothe*, 65 O. S. 186; *Newark v. Gas & Fuel Co.*, 65 O. S. 210.

Having fixed one standard for prices for ten years, which has been duly accepted by the company, council cannot within that period, fix another standard. *Ib.*

The power to regulate includes the power to demand reports, data, etc. *Cline v. Springfield*, 7 N. P. 626.

The fact that price fixed has afterwards become inadequate is not ground for relief. *Manhattan Trust Co. v. Gas Co.*, 7 O. F. D. 578.

**Reasonableness of regulation.**—A regulation without taking into consideration the amount of gas consumed is void. *Toledo v. N. W. Ohio Nat. Gas Co.*, 5 C. C. 557.

**Reasonableness presumed.**—Price fixed is presumed reasonable until the contrary is proved. *Bellaire Goblet Co. v. Findlay*, 5 C. C. 418. See also *State ex rel. v. Gas Co.*, 37 O. S. 45; *Central O. Gas & Fuel Co. v. Columbus*, 16 Dec. 359.

But no presumption arises when answer denies reasonableness of price fixed by ordinance and when a contract exists in which a reasonable price is to be fixed by agreement. *Toledo v. N. W. Ohio Nat. Gas Co.*, 5 C. C. 557.

**Presumption of validity of ordinance.**—Ordinance regulating price is presumed valid until contrary is proved. *State ex rel. v. Ironton Gas Co.*, 37 O. S. 45, 49.



And inadequacy of price in absence of fraud or bad faith will not be inquired into. *Id.*

**When council does not regulate.**—Electric light company must furnish light to all inhabitants alike at reasonable price when council has not regulated the price. *Railway v. Bowling Green*, 57 O. S. 336.

**How regulation may be enforced.**—Gas company must furnish gas at the rates fixed; failing to do so, mandatory injunction will lie. *Gas Light Co. v. Zanesville*, 47 O. S. 35. See also *Toledo v. N. W. Ohio Nat. Gas Co.*, 5 C. C. 557.

## FORM OF ORDINANCE REGULATING PRICE OF GAS.

Ordinance No. ....

To regulate the price which the.....Company may charge for gas for and during the ensuing.....years.

Be it ordained by the council of the city [or village] of....., State of Ohio:

Sec. 1. That during the period of.....years from and after the passage of this ordinance and its acceptance by the.....Company, said company may charge for gas of not less than.....candle power furnished to the citizens or private consumers and to the public buildings, grounds, streets, lanes, alleys, avenues, market places [etc.] of the city [or village] of....., for illuminating purposes, .....per thousand cubic feet. If paid within.....days after the dates of monthly settlements, then a discount of.....per thousand cubic feet shall be allowed. For all gas supplied and used exclusively for heating and fuel purposes, through a separate service and meter, said company may charge during said period.....per thousand cubic feet. If paid within.....days after the dates of monthly settlements, then a discount of.....per thousand cubic feet shall be allowed.

The said The.....Company shall in no event, during said term of.....years, charge for gas furnished as above mentioned, more than the prices herein specified.

Sec. 2. This ordinance shall take effect and be in force from and after its acceptance by said The.....Company, and its publication as required by law.

Passed.....19.....

.....  
President of Council.

Attest: .....

Clerk.

[Accepted.....19....]

NOTE.—The charge for lighting streets, etc., and the method of computing bills therefor, as per lamp or otherwise, will be governed by any contract made between company and municipality.

**Sec. 2479.** [Price at which company shall furnish electricity or gas not to be reduced during term agreed upon.] In case the council fixes the price at which it shall require any company to furnish electricity or either natural or artificial gas to the citizens, or public buildings, or for the purpose of

lighting the streets, alleys, avenues, wharves, landing places, public grounds or other places or for other purposes, for a period not exceeding ten years, and the company or person so to furnish such electricity or gas shall assent thereto, by written acceptance, filed in the office of the clerk of the corporation, it shall not be lawful for the council to require such company to furnish electricity or either natural or artificial gas, as the case may be, at a less price during the period of time agreed on, not exceeding ten years,<sup>1</sup> as aforesaid; and every ordinance or resolution heretofore passed by any municipal corporation fixing a minimum price for furnishing electricity or either natural or artificial gas as aforesaid, which has been assented to by any company or person by written acceptance filed in the office of the clerk of the corporation, shall be as valid and said price shall be as binding as if this act had been in force when any such price was in terms so fixed and accepted.<sup>2</sup> [1904, April 23, 97 v. 263; 66 v. 218.]

(1) **Contract beyond legal period.**—Where the power is given to the municipality to contract for a period "not exceeding ten years," the conclusive implication is that the municipality is forbidden to contract for a longer period, and contract exceeding such legal period is *ultra vires* and void, and the contractual stipulations contained therein are equally void and neither party can enforce them. *Wellston v. Morgan*, 59 O. S. 147. See also *Gas & Fuel Co. v. Chillicothe*, 65 O. S. 186, 207; *Davy v. Hyde Park*, 16 C. C. 507 (aff'd 61 O. S. 638); *Cincinnati Gas Light & Coke Co. v. Avondale*, 43 O. S. 257, 267; *Lima Gas Co. v. Lima*, 4 C. C. 22. But see *contra*, *Toledo v. N. W. Ohio Natural Gas Co.*, 5 C. C. 557.

Such a contract beyond the legal period will in no way affect the authority of the municipality to regulate the price of gas, even though the contract has been performed by both parties for the legal period. *State ex rel. v. Ironton Gas Co.*, 37 O. S. 45.

But an ordinance fixing the price of gas to be charged for a period of ten years, the price fixed not to go into effect until six months after the passage and taking effect of the ordinance and continue ten years from and after such six months, is not a contract exceeding the legal

period, but is valid and binding for ten years from the date when the price fixed goes into effect. *Logan Natural Gas Co. v. Chillicothe*, 65 O. S. 186.

An ordinance regulating the price of gas, is not within the restrictions of § 1691 R. S. (under OFFICERS, subdivision *Council*, page 539) providing that council shall not enter into any contract which is not to go into full operation during the term for which all the members of such council are elected. *Ib.*

(2) **Change in price.**—When the council has fixed the price of gas according to one standard and the price has been duly accepted by the company, it cannot be altered without the consent of the company, by fixing another standard, which may affect the price previously fixed. *Logan Natural Gas Co. v. Chillicothe*, 65 O. S. 186; *State ex rel. v. Gas Co.*, 37 O. S. 45.

But if no contract has been made with a company, council has power to regulate the price from time to time. *State ex rel. v. Gas Co.*, 37 O. S. 45.

The fact that council has fixed the maximum price for one company, does not prevent council, within the ten years, from fixing a lower maximum price for another company. *Central Ohio Gas & Fuel Co. v. Columbus*, 16 Dec. 359.

Such an ordinance, fixing a lower price for another company, does not affect the price fixed for the first company. *Ib.*

**Natural gas companies.**—This section was held to apply to natural gas companies, even before the amendment of 1904. *Toledo v. N. W. Ohio Nat. Gas Co.*, 5 C. C. 557.

**Sec. 2480 R. S.** [When council may occupy streets for gas purposes, etc.] If such companies are, at any time, required by the council to lay pipes, and light any street, alley, avenue, wharf, landing place, public ground or building, and refuse or neglect for six months after being notified, by authority of the council, to comply with such requirement, the council may lay pipes and erect gas works, for lighting such streets, alleys, or public grounds, and all other streets, alleys, and public grounds, not already lighted; and such gas companies or gas-light and coke companies, shall thereafter be precluded from using or occupying any of the streets, alleys, public grounds or buildings, not already furnished with gas pipes of such companies; and the council may open any street for the purpose of conveying gas as aforesaid.<sup>1</sup> [66 v. 218, § 417; (S. & C. 1534).]

(1) **Erection of plant by municipality, when.**—It is not necessary in order that municipalities may erect and operate gas works that the contingency provided for

in § 2480 R. S. arise. *State ex rel. v. Hamilton*, 47 O. S. 52.

**Vested rights.**—No vested rights of a gas company are taken away by a municipality erecting its own plant. *Ib.*

**Sec. 2481 R. S.** [Gas companies may be permitted to occupy streets.] The council may, at any time after the default mentioned in the preceding section, permit such gas companies to use and occupy the streets, alleys, and public grounds of such corporation, for the purpose of lighting the same, and furnishing gas to the citizens and public buildings. [66 v. 218, § 418; (S. & C. 1538).]

**Sec. 2482 R. S.** [Forfeiture of charter for neglect to furnish gas, etc.] A neglect to furnish gas to the citizens, and other consumers<sup>1</sup> of gas, or to the corporation, by any company, in accordance with the prices fixed and established by the council; from time to time, shall forfeit all rights of such company under the charter by which it has been established; and the council may proceed to erect, or, by ordinance, empower any person to erect gas works, for the supply of gas to such corporation and its citizens; provided that nothing in this section or in sections *twenty-four hundred and seventy-nine* and *twenty-four hundred and eighty*, shall operate to impair or affect any contract heretofore made between any municipal corporation and any gas-light and coke company.<sup>2</sup> [66 v. 219, § 419; (S. & C. 1535).]



(1) **Consumer, who is.**—As to person using gas only occasionally, see *Adams Exp. Co. v. Gas Co.*, 21 B. 18.

(2) **Power of municipality on default of company.**—Gas companies organized and operating under laws of 1874 could not substitute

natural for artificial gas, and under this section the municipality could, after abandonment by company of its artificial plant, provide for light and heat for its inhabitants by supplying natural gas. *Findlay Gas Light Co. v. Findlay*, 2 C. C. 237.

**Sec. 2483 R. S. [A temporary failure shall work no forfeiture.]**

A temporary failure to furnish gas shall not operate as a forfeiture, unless such failure is through the neglect or misconduct of such gas-light, or gas-light and coke company. [66 v. 219, § 420; (*S. & C.* 1538).]

**Sec. 2484 R. S. [Council may appoint gas inspector; his duties and compensation.]** The council of any corporation in which gas works may be constructed may provide, by ordinance, for the appointment of an officer, to be known as inspector of gas, whose duty it shall be to inspect all gas and gas meters, and certify the correctness of all bills against consumers of gas, make photometric tests, and perform such other duties as may be prescribed by ordinance; and the council shall fix his compensation. The council may also provide for the inspection and testing of meters used for measuring electric current for electric light, power or other purposes, furnished by any individual or company within the corporation, and may prescribe a suitable charge for such inspection and testing, and the manner of collecting the same.<sup>1</sup> [91 v. 299; 66 v. 219, § 421; 73 v. 227, § 4.]

(1) **Validity.**—Legislature may provide for inspection of meters and assess the cost of inspection upon

the companies in proportion to their valuation. *Cin. Gas L. and C. Co., v. State*, 18 O. S. 237.

**Sec. 2485 R. S. [Exclusive monopoly shall not be allowed to gas companies.]** It shall not be lawful for any council to agree by ordinance, contract, or otherwise, with any person or persons,<sup>1</sup> for the construction or extension of gas works for manufacturing or supplying the corporation or its inhabitants with gas, which shall give or continue to any person or persons making such agreements with the council the exclusive privilege<sup>2</sup> of using the streets, lanes, commons, or alleys, for the purpose of conveying gas to the corporation, or the citizens thereof, or which shall deprive the council of the right to designate the kind of meter to be used for the correct measurement of the gas furnished under such agreement, and to provide for inspecting or regulating the same, or which shall not specify

the exact quality of the gas<sup>3</sup> to be furnished, and reserve to the council the right to enforce an exact compliance with such specification, under such rules as the council may prescribe; nor shall the council make any such agreement which shall not secure to the council the right to purchase such works, and all the appurtenances belonging thereto, at any time within the existence of such contract or agreement. [66 v. 219, § 422; (S. & S. 902).]

(1) **Meaning of "person or persons."**—The words "person or persons," as used in R. S., § 2485, include a gas company or other private corporation. Cin. Gas L. and C. Co. v. Avondale, 43 O. S. 257.

But this section does not apply to natural gas companies. Gas and Fuel Co. v. Chillicothe, 65 O. S. 186; Newark v. Gas and Fuel Co., 65 O. S. 210.

(2) **Certain contracts prohibited.**—Council could not, without clear legislative authority, grant to any person or corporation the exclusive use of the streets for certain purposes. State *ex rel.* v. Cin. Gas L. and C. Co., 18 O. S. 262. see also Cin. Gas L. and C. Co. v. Avondale, 43 O. S. 257, 267.

An ordinance granting to a gas company the exclusive right to lay pipes in the street for furnishing

gas, is void. Hamilton v. Gas Co., 8 N. P. 319; Morrow, etc., Co. v. Mt. Gilead, 8 N. P. 669.

Council cannot agree to put beyond the control of a village the price and quality of gas, as well as the quantity the village would require in the future. Cin. Gas L. and C. Co. v. Avondale, 43 O. S. 257, 269.

(3) **Certain rights.**—A contract with a city is not void for the reason it does not reserve the right to purchase the works. Lima Gas Co. v. Lima, 4. C. C. 22.

The city cannot barter away its power to contract for the purchase of gas works. *Ib.*

**Company subject to change of grade.**—Pipes laid by a company in a street must be changed to conform to a new grade. Gas L. & C. Co. v. Columbus, 50 O. S. 65.

**Sec. 2485a R. S.** [Consolidation of companies doing business in same municipality.] Any two or more of the companies mentioned in section 2478 or any electric light and power company and any water company or any heating company and any inclined movable or rolling road company, which are doing business in the same municipal corporation or which are incorporated and organized for the purpose of doing business in the same municipal corporation, may consolidate into a single corporation in the same manner and with the same effect as provided for the consolidation of railroad companies in sections 3381, 3382, 3383, 3384, 3385, 3386, 3387, 3388, 3390, 3391, and 3392 of the Revised Statutes and any and all acts amendatory and supplementary to said sections. [1904, April 23, 97 v. 281; 94 v. 315.]

**Sec. 2486 R. S.** [Council may erect or purchase gas or electric works.]<sup>1</sup> The council of any city or village shall have power,

whenever it may be deemed expedient and for the public good, to erect gas works or electric works at the expense of the corporation, or to purchase any gas<sup>2</sup> or electric works already erected therein;<sup>3</sup> provided, that in villages where gas works or electrical works have already been erected by any person, company of persons, or corporation, to whom a franchise<sup>4</sup> to erect and operate gas works or electric works has been granted, and such franchise has not yet expired, the council shall, with the consent of the owner or owners purchase such gas works or electric works already erected therein, and in event the council and owner or owners of any such gas or electric works shall be unable to agree upon the compensation to be paid for such gas works or electric works, the council may file in the probate court of the county where such gas or electric works are located, a petition to appropriate such gas works or electric works, and thereupon the same proceedings of appropriation shall be had as is provided for the appropriation of private property by municipal corporation.<sup>5</sup> Provided that any municipal contract existing between any village and such person, company of persons or corporation for the public or street lighting shall be considered as an element of value in fixing the compensation to be paid for such gas works or electric works. [1902, May 12: 95 v. 599; 93 v. 59; 66 v. 219, § 423; (S. & S. 902; S. & C. 1535).]

(1) **Power to erect and maintain lighting plants** is also given to municipalities in paragraph 15, of § 7 of the Code, page 54.

**Other similar municipal powers.**—Power of municipality to build dams for certain purposes, erect poles to transmit electricity, and lay pipes for conducting natural gas, petroleum, etc., will be found in § 3878 Revised Statutes.

(2) **Natural gas included.**—This section includes natural as well as artificial gas works. *Bellaire Goblet Co. v. Findlay et al.*, 5 C. C. 418, 425.

**Applicability of section.**—This section does not refer to works already erected. *Columbus v. Kauffman*, 8 N. P. 231.

(3) **Scope of power.**—Although company was organized and in operation at passage of this act, municipality may purchase or erect its

own plant. *State ex rel. v. Hamilton*, 47 O. S. 52.

And company is not deprived of vested rights. *Ib.* See also *Hamilton Gas L. and C. Co. v. Hamilton*, 7 O. F. D. 358; 146 U. S. 258.

Having the power to erect gas works, municipality has the right to levy taxes to meet the cost of such works, and the property of a gas company within its limits will be subject to such taxation. *Hamilton Gas L. & C. Co. v. Hamilton*, 6 O. F. D. 256; 37 Fed. 832.

This section gives authority to purchase and erect gas and electric plants. It was held not to be inconsistent with § 2489 R. S., now repealed. The latter section did not give trustees authority to bind municipality by general contract, but money arising from the operation of the works could be used independently of council. *Kerr v. Bellefontaine*, 59 O. S. 446.



The powers given in this section to council were held not to be superseded by powers given to trustees under § 2489 R. S. repealed. *Dalzell, Gilmore and Leighton v. Findlay et al.*, 5 C. C. 435, 440.

**Management of gas works.**—*In cities*, see § 141 of the Code. *In villages*, see § 205 of the Code.

See *Kerr v. Bellefontaine*, 13 C. C. 24.

(4) **Who can grant franchise.**—The rights to use streets for gas purposes is a franchise and must emanate, directly or indirectly, from the legislature. *State v. Cin. Gas L. and C. Co.*, 18 O. S. 262.

(5) See §§ 10 to 22 of the Code.

**Sec. 2489—1 R. S. [Trustees of natural gas plants; may sell to village, etc.; delivery of gas in village.]** In all cases where any municipal corporation in this state is the owner of a natural gas plant by which the citizens of said municipal corporation are supplied with natural gas, and such natural gas is so supplied through pipes from a point beyond the limits of such corporation, which pipes pass through the limits of an incorporated village, the trustees<sup>1</sup> of any such natural gas plant are hereby authorized to sell natural gas to such village, or to a company, for the use of such village, and the citizens thereof, such gas to be delivered at a reducing station to be located within one hundred feet of the main pipe line. [87 v. 249.]

(1) See §§ 141 and 205 of the Code.

**Sec. 2489—2 R. S. [Delivery of gas outside of village: how allowed.]** Whenever a municipal corporation is the owner of a natural gas plant to supply the citizens thereof with natural gas for fuel, the council of such municipal corporation, together with the natural gas trustees,<sup>1</sup> may provide for supplying natural gas at rates to be determined by said board of trustees, to persons living outside of and in the vicinity of such municipal corporation, and to county infirmaries, children's homes and other public institutions within or without such municipal corporations; and to encourage the location or establishment of manufacturing industries within such municipal corporation may reduce the price of gas to be used to operate such manufacturing, or donate the same for a term of years for said purpose; provided, that this section shall be inoperative if such gas so to be furnished for such purpose shall deprive the municipal corporation or the citizens thereof of the full supply of such gas. [87 v. 249.]

(1) See §§ 141 and 205 of the Code.

**Sec. 2489—3 R. S. [Municipalities authorized to lay pipes for natural gas, etc., outside of corporate limits.]** Any city or village authorized and empowered by any general or special law to purchase or lease lands, purchase, lease or sink natural

gas wells, procure right of way, purchase and lay down pipes, etc., for the purpose of supplying such city or village, or the citizens thereof, with natural gas, is hereby authorized and empowered to exercise any or all of said powers outside of its corporate limits. And all the rights and powers conferred upon companies by sections *thirty-eight hundred and seventy-eight* and *thirty-eight hundred and eighty* (3878 and 3880), as amended March 24, 1888, and subject to all the restrictions therein, are hereby conferred upon the cities and villages above referred to. [86 v. 203.]

**Sec. 2490 R. S. [Laying of gas-pipes, and expense thereof.]**

The council may prescribe, by ordinance, for the laying down of gas pipes in all highways about to be paved, macadamized, or otherwise permanently improved, and for the assessment of the cost and expense thereof upon the lots or parcels of land adjoining or abutting upon the highways in which the same are laid; but in no case, excepting as a sanitary measure, shall the council require any house connections to be built further from the main pipe than the outer line of the curb-stone. [66 v. 220, § 427.]

**Sec. 2491 R. S. [Contracts to supply municipality with electric light or gas.]** A municipal corporation may contract with such company for supplying, with electric light, natural or artificial gas, for the purpose of lighting or heating the streets, squares and other public places and buildings in the corporation limits.<sup>1</sup> [98 v. 150; 86 v. 62; 84 v. 39.]

(1) **Company** organized for the manufacture of electrical supplies is not a company contemplated by this section. *Brush Electric Light Co. v. Jones Bros. Elec. Co., et al.*, 23 B. 329, 331.

**Power of municipality to make contract** for lighting streets, etc., is also conferred in § 45 of the Code (p. 172) and certificate of auditor of money in the treasury is not required. As to requirement under former law, see *Ampt v. Cincinnati*, 2 N. P. 332.

**Time of contract limited.**—Municipality cannot contract with a company for lighting or heating for

a period exceeding ten years by provisions of § 2479 R. S. *Gas Co. v. Lima*, 4 C. C. 22.

**Interest on payments** overdue on a contract to supply public lights may be collected against municipality. *Electric Co. v. Toledo*, 13 Dec. 137.

**Contract to "furnish light"** construed to include agreement to furnish lamps. *Newark v. Light & Power Co.*, 3 O. L. R. 644.

**Restrictions in former law.**—This section was formerly made subject to the provisions of § 3551 R. S., which required that before any

company with which such contract was made should go into operation where a company had already been formed, there should be a vote of the electors. This restriction is omitted from the amendment of 1906, and § 3551 has also been amended omitting the restriction.

**Section cited.**—§ 2491 R. S. is cited in the following cases: Findlay Gaslight Co. v. Findlay, 2 C. C. 237; Toledo v. N. W. Ohio Nat. Gas Co., 5 C. C. 557, 571; Bellaire Goblet Co. v. Findlay, 5 C. C. 418, 424; Circleville L. & P. Co. v. Buckeye Gas Co., 69 O. S. 259, 269.

An act authorizing the issuing of bonds of municipal corporations for enlarging, improving or extending natural gas works, and providing for submitting issuing the same to a vote of the people.

[§ 1.] **[Municipalities authorized to issue bonds for purpose of improving natural gas works.]** The council, board of legislation or other legislative body or bodies of any municipal corporation of the state of Ohio shall have power to issue and sell bonds in such manner as is provided by law for the sale of bonds by municipal corporations, at a rate of interest not exceeding 6 per cent., whenever such council, board of legislation or other legislative body or bodies, by an affirmative vote of not less than two-thirds of the members elected or appointed thereto shall, by resolution or ordinance, deem the same necessary for the purpose of extending, enlarging, improving, repairing or securing a more complete enjoyment of any natural gas works owned by such municipal corporation, subject, however, to the provisions of section 2 of this act.

[§ 2.] **[Question of issue to be submitted to vote.]** Before any such bonds are issued, the question of issuing the same shall be submitted to the voters of the municipal corporation at a general or special election, whenever the council of any municipal corporation shall, by resolution or ordinance, passed by an affirmative vote of not less than two-thirds of all the members elected or appointed thereto, declare it necessary to issue and sell the bonds of such municipal corporation for any of the purposes set forth in section 1 of this act, they shall, by such resolution or ordinance fix the date upon which the question of the issue and sale of such bonds shall be submitted to the electors of such municipality, and shall cause a copy of such resolution or ordinance to be certified to the deputy state supervisors of the county in which such municipal corporation is situated, and such deputy state supervisors shall thereupon proceed to prepare the ballots and make all other necessary arrangements for the submission of such question to the electors of such municipal corporation at the time fixed in such resolution or ordinance. Such election shall be held at the regular place or places of voting in such municipal corporation, and shall be conducted, canvassed and certified in the same manner,



except as otherwise provided by law, as November elections in such municipal corporation for the election of officers thereof; provided, however, that, when a special election for such purpose is held in a municipal corporation divided into wards, there may be but one voting place in each ward, which shall be designated by the deputy state supervisors of elections, and the notice hereinafter provided for shall designate the voting places in each ward. In all cities in which registration is required, if but one voting place is designated in each ward, certificates of removal shall not be necessary, except where transfers are required from one ward to another, and the board of deputy state supervisors of all such cities shall issue such removal certificates. Fifteen days' notice of the submission shall be given in one or more newspapers printed therein once a week for two consecutive weeks, stating the amount of bonds to be issued, the purpose for which they are to be issued, and the time and place of holding the election; and, if no newspaper is printed therein, the notice shall be posted in a conspicuous place and published once a week for two consecutive weeks in some newspaper of general circulation in the municipal corporation. If two-thirds of the voters voting at such election upon the question of issuing the bonds vote in favor thereof, then, and not otherwise, the bonds shall be issued, and a tax may be levied for the purpose of paying the interest and principal upon such bonds. Those who vote in favor of the proposition shall have written or printed on their ballots, in quotation, "For the issue of bonds"; those who vote against the same shall have written or printed on their ballots the words, "Against the issue of bonds." [1904, April 23, 97 v. 237; 95 v. 478.]

An act to authorize trustees of townships and councils of municipalities to make additional levy for the purpose of drilling an oil or gas well when authorized by vote of the electors of such township or municipality.

[§ 1.] [Township trustees and council of municipality authorized to levy tax for drilling oil or gas well.] The trustees of any township or council of any municipality in the state of Ohio, be, and the same are hereby authorized to levy an additional tax not exceeding five mills on the dollar in addition to the tax already authorized by law, when so authorized by a majority vote of the electors of such township or municipality at a regular or special election, said election to be conducted the same as elections for township or municipal officers, the same to be collected as other taxes, for the purpose of drilling an oil or gas well in such township or municipality. [1902, May 9: 95 v. 449.]

## VII

## GAS AND WATER COMPANIES.

**Sec. 3550 R. S. [Powers of gas and water companies.]** A company organized for the purpose of supplying gas for lighting the streets and public and private buildings of a city, village, town, or township, may manufacture, sell, and furnish the gas required therein for such or other purposes;<sup>1</sup> and a company organized for the purpose of supplying the inhabitants of a city, village, town, or township with water may sell and furnish any quantity of water required therein for such or other purposes;<sup>2</sup> and such companies may lay conductors for conducting gas or water through the streets, lands, alleys, and squares in such city, village, town, or township, with the consent of the municipal authorities of the city, village, or town, or with the consent of the trustees of the township, and under such reasonable regulation as they may prescribe.<sup>3</sup> [64 v. 255, § 53]

(1) **Powers of gas company.**—Company is not authorized to have exclusive right to lay its conductors in the streets, by virtue of this section. *State v. Hamilton*, 47 O. S. 52; and ordinance granting it exclusive use is void. *Hamilton v. Gas Co.*, 8 N. P. 319. See also *State ex rel. v. Cin. Gas Light and Coke Co.*, 18 O. S., 262. Gas company organized under special charter is subject to the general laws of the state, unless clearly exempted by the terms of its charter. *State ex rel. v. Gas Co.*, 34 O. S. 572.

Company organized to furnish illuminating gas, under earlier laws, cannot substitute natural gas. *Findlay Gas Light Co. v. Findlay*, 2 C. C. 237.

Company organized to furnish gas

for lighting purposes, may amend its charter so as to allow it to furnish both gas and electric lighting. *Picard v. Hughey*, 58 O. S. 577.

Power to borrow money and give mortgage, see *Hays v. Galion Gas Co.*, 29 O. S. 330; *Burt v. Rattle*, 31 O. S. 116.

(2) **Powers of water company.**—Such company has no right to appropriate property under this section. *State v. Salem Water Co.*, 5 C. C. 58.

Regulation of price of water by council, see § 2478 R. S., p. 656.

(3) **Conditions which may be imposed.**—Council can only impose such restrictions upon the use of the streets by such companies as may protect the public and reimburse the

city for expenses of inspection, etc., but cannot exact a sum of \$4,000 per annum as a revenue from the use of the streets. *Columbus v.*

*Columbus Gas Co.*, 14 Dec. 416; 2 N. P. (N. S.) 37; see also same case, 15 Dec. 645; 3 N. P. (N. S.) 293.

**Sec. 3550a R. S.** [**Gas companies and electric companies may manufacture and supply both electricity and gas; contracts with municipality.**] Every corporation organized under the laws of this state to manufacture and supply artificial gas for light, heat and power purposes or for any [of] such purposes, and every corporation organized under the laws of this state to manufacture and supply electricity for light, heat and power purposes, or for any of such purposes, shall, in addition to all powers heretofore conferred, have power, subject, however, to statutory provisions in force relating to the granting of franchises by municipalities for either of said purposes at the time of the granting of the franchise, to manufacture and supply electricity and artificial gas, respectively, for light, heat and power purposes and to make all contracts, and to do all things necessary and convenient for furnishing the same for both public and private objects; provided nothing herein shall be held to confer any right to engage in any such business or to erect or maintain any structures in any streets, alleys or public places without the consent of the municipality in which the same are to be constructed, and all ordinances and resolutions heretofore passed by any municipal corporation, and all contracts heretofore made by and between any municipality and any company so organized to manufacture and supply gas, which were and still are intended to provide for supplying electricity for any municipal purpose and as to which the time of performance has not commenced to run or has not expired, shall be as valid and binding as if this statute had been enforced when such ordinance or resolution was passed or any such contract was made.<sup>1</sup> [98 v. 150; 97 v. 258; 90 v. 291.]

(1) This section, before amendment of 1906, provided that contracts with the municipality should

be subject to § 3551 as it then read. See note under § 3551 *infra*.

**Sec. 3551 R. S.** [**Contracts to supply municipality with light and water.**] The municipal authority of any city or village or the trustees of any township, in which any gas or water company is organized, may contract with any such company



for lighting or supplying with water the streets, lands, lanes, squares and public places in such city, village, town or town-ship.<sup>1</sup> [98 v. 150; 71 v. 93.]

(1) **Contract with municipal-ity.**—See § 45 of the Code, where such contracts are authorized to be made, subject to the provisions of § 3551 R. S., and are exempted from the requirement of a certificate of money in the treasury before expenditure is made, page 172.

**Restrictions in former law.**—Before the amendment of 1906, this section provided that “no such company shall go into operation in any city or village where a corporation has been already formed, or is hereafter formed, until after the question of authorizing such operation has been submitted to the qualified voters of such city or village, and authorized by ordinance.” For cases

relating to the question as to when a vote was required under such section, see *Hunter v. Austin*, 9 C. C. 583; *Circleville L. & P. Co. v. Buckeye Gas Co.*, 69 O. S. 259; *Gas Co. v. Lima*, 4 C. C. 22.

**Liability of company.**—Water company is not liable to inhabitant, because of contract with municipality, for injury due to failure to supply water for fire protection. *Blunk v. Dennison Co.*, 71 O. S. 250.

**Power of company**, as to appropriation of property, denied. *State ex rel. v. Water Co.*, 5 C. C. 58.

**Section cited**, see *State ex rel. Hamilton*, 47 O. S. 52, 69.

**Sec. 3552 R. S. [Gas company may extend pipes beyond city.]**

A gas company in any city or village may extend<sup>1</sup> its pipes used for conveying gas to the various localities and inhabitants of such city or village, to any point or place in the vicinity of such city or village outside the corporate limits thereof; but the right of way must be obtained from the corporate or other authorities, or person having control of the places to be affected by such extension. [56 v. 92, § 1; (S. & C. 351).]

(1) **When extension may be granted.**—As to what would amount to establishment of com-pany, so that it might be granted an extension, see *Cincinnati Gas Co. v. Avondale*, 43 O. S. 257.

**Sec. 3553 R. S. [Standard measure for gas.]** The standard or unit of measure for the sale of illuminating gas by meter shall be the cubic foot, containing sixty-two and three hundred twenty-one one-thousandth pounds avoirdupois weight of distilled or rain water, weighed in air, of the temperature of sixty-two degrees Fahrenheit's scale, the barometer being at twenty-nine and one-half inches. [63 v. 164, § 5; (S. & S. 159).]

**Sec. 3554 R. S. [Meter must be sealed and stamped.]** No meter shall be set unless it is tested by a meter-prover, sealed and stamped as provided in section *thirty-five hundred and fifty-six*, and any company authorizing the setting of a meter, or allowing the same to be used by any consumer of gas, without being so sealed and stamped, shall forfeit and pay not less than twenty-five nor more than one hundred dollars, to be recovered upon the complaint of any such consumer, in the name of the state, before any court of competent jurisdiction. [64 v. 39, § 6; (S. & S. 161).]

**Sec. 3555 R. S. [Gas companies to furnish certain apparatus.]** There shall be provided, at the expense of the gas companies of this state, by the state sealer of weights and measures, at the Ohio state university, a standard measure of the cubic foot, and such other apparatus as in his judgment shall be necessary for the performance of his duties under this chapter. [88 v. 123; 63 v. 164, § 7; (S. & S. 159).]

**Sec. 3556 R. S. [How and when meters in use to be tested.]** Meters in use shall be tested on the request of the consumer, in his presence, if desired, with a meter-prover tested and sealed as provided in section *thirty-five hundred and sixty-one*, by an officer or servant of the company; if the meter be found to be correct, the party requesting the inspection shall pay a fee of twenty-five cents, and the expense of removing the same for the purpose of being tested, and the re-inspection shall be stamped on the meter; if proved incorrect, no fees or expense shall be paid by the consumer, and the company shall furnish a new meter without any charge to the consumer; and no gas company shall have the right to charge rent for meters. [64 v. 39, § 9; (S. & S. 161).]

**Sec. 3557 R. S. [What is merchantable gas.]** Illuminating gas shall not be merchantable in this state which has a minimum value of less than twelve candles—that is, a burner consuming five cubic feet per hour shall give a light, as measured by the photometric apparatus in ordinary use, of not less than twelve standard sperm candles, each consuming one hundred and twenty grains per hour; and every gas-meter must be tested with the burner, and under the pressure best adapted to it, and the result shall be calculated at a temperature of sixty degrees Fahrenheit. [64 v. 39, § 10; (S. & S. 162).]

**Sec. 3558 R. S. [Agents of company may enter premises to inspect meter.]** An officer or servant of a gas company, duly au-

thorized in writing by the president, treasurer, agent, or secretary of the company, may, at any reasonable time, enter any premises lighted with gas supplied by such company, for the purpose of examining or removing the meters, and of ascertaining the quantity of gas consumed or supplied; and if any person, at any time, directly or indirectly, prevent or hinder any such officer or servant from so entering any such premises, or from making such examination or removal, such officer or servant may make complaint under oath, to any justice of the peace of the county wherein such premises are situate, stating the facts in the case, so far as he has knowledge thereof, and the justice may thereupon issue a warrant, directed to any constable of the city or town where such company is located, commanding him to take sufficient aid, and repair to such premises, accompanied by such officer or servant, who shall examine such meters and ascertain the quantity of gas consumed or supplied therein, and, if required, remove any meters belonging to the company. [63 v. 164, § 11; (S. & S. 159).]

**Sec. 3559 R. S. [When company may shut off the gas.]** If any person so supplied with gas neglect or refuse to pay the amount due for the same, or for the rent of the meter, or other articles hired by him of the company, the company may stop the gas from entering the premises of such person; in such cases the officers, servants, or workmen of the gas company may, after twenty-four hours' notice, enter the premises of such parties, between the hours of eight in the forenoon and four in the afternoon, and take away such meter, or other property of the company, and may disconnect any meter from the mains or pipes of the company; and no gas company shall have the right to refuse to furnish gas on account of any arrearages due the company for gas furnished to former occupants of the same premises. [63 v. 164, § 12; (S. & S. 160).]

**Sec. 3560 R. S. [Penalties for tampering with meters.]** Every person who willfully or fraudulently injures, or suffers to be injured, any meter belonging to any gas company, or prevents any meter from duly registering the quantity of gas supplied through the same, or in any way hinders or interferes with its proper action or just registration, or attaches any pipe to any main or pipe belonging to such company, or otherwise burns or uses or causes to be used, any gas supplied by such company, without the written consent of an officer thereof, unless the same passes through a meter set by the company, or fraudulently burns the gas of the company, or waste[s] the same, shall for every such offense, forfeit and pay to the company not more



than one hundred dollars, to be recovered in an action brought by the company against such offender, and in addition thereto, shall pay the company the amount of damage by it sustained by reason of such injury, prevention, waste, consumption or hindrance. [63 v. 164, §§ 13, 14; (S. & S. 160).]

**Sec. 3561 R. S.** [Each company to provide certain apparatus.] All gas companies supplying the public with illuminating gas which are not supplied with such apparatus, shall forthwith provide for their use a meter-prover, the holder of which shall contain not less than five feet, the same to be tested, stamped, and sealed by the state sealer of weights and measures, at the Ohio state university, before being used, and a photometer for the comparison of the lights of gases and candles by means of a disk.<sup>1</sup> [88 v. 123; 73 v. 227, § 3; (S. & S. 159).]

(1) **Liability** imposed here, is independent of negligence. Gas Fuel Co. v. Andrews, 50 O. S. 695.

**Sec. 3561a R. S.** [Laws made applicable to natural gas companies in certain cities.] The provisions of this chapter, so far as the same may be applicable, shall apply also to any company organized for the purpose of supplying the public and private buildings and manufacturing establishments of all cities of the third grade of the second class, having a population not exceeding 16,000 at [the] federal census of A. D. 1880, with natural gas for fuel; but said company shall be liable for any damage that may result from the transportation of the same, provided the township trustees shall not assent to the laying down of any line of pipes in any township of this state, as provided in sections *three thousand five hundred and fifty* and *three thousand five hundred and fifty-one*, until the company or corporation proposing to lay the same shall obtain the assent, in writing of a majority of the land-owners whose lands may be adjacent to the road or highway upon which said line of pipes or conductors are to be laid. [1885, May 1: 82 v. 213.]

## VIII

## LIGHTING OF RAILWAYS AND BRIDGES.

**Sec. 2494 R. S.** [Council to pass ordinance to light bridge or railway; shall not require railway to use electric arc lights.]<sup>2</sup> When it is deemed necessary by the council of any city or village to have any bridge or railway, located in whole or in part in such corporation, owned, possessed, or operated by any individual, company, association or corporation, or any portion of the same, lighted, the council shall pass an ordinance for that purpose, requiring the individual, company, association, or corporation, owning possessing or operating the same, to light such bridge or railway within a specified time;<sup>3</sup> provided, that it shall not require any such railway or portion thereof to be lighted with electric arc lights. [1902, May 7: 95 v. 419; 67 (69) v. 47, § 429.]

(1) **Title, division and chapter.**—Sections carried here formed part of Chap. 4, Div. 8, Title XII, R. S. None of the sections of this chapter are re-enacted by the Code. Those sections not given here, are repealed by the Code.

(2) This section is given as amended May 7, 1902.

(3) **Validity.**—Law requiring railroad to light its tracks within city or village is constitutional. C. H. & D. R. R. v. Sullivan, 32 O. S. 152; Ravenna v. Pennsylvania Ry. Co., 45 O. S. 118; C. H. & D. R. R. v. Bowling Green, 57 O. S. 336.

§§ 2294 to 2498 R. S. are valid. C. C. C. & St. L. Ry. Co. v. Village of St. Bernard, 15 C. C. 588.

**Any railroad.**—This includes a company operating the road, though neither the owner nor the lessee. C. H. and D. R. R. v. Bowling Green, 57 O. S. 336.

**Requirements must be reasonable.**—Municipality may specify the kind of light, and where lights must be placed, but it must not act unreasonably or arbitrarily. C. C. C. & St. L. Ry. Co. v. Village of St. Bernard, 15 C. C. 588; C. H. and D. R. R. v. Bowling Green, 57 O. S. 336.

A requirement that company proceed within twenty days from receipt of notice is not unreasonable. St. Mary's v. Railroad, 60 O. S. 136.

## FORM OF ORDINANCE REQUIRING RAILWAY TO BE LIGHTED.

Ordinance No. —.

Requiring The.....Railroad Company to light its railway within the city [or village] of.....

Be it ordained by the council of the city [or village] of....., State of Ohio:

Sec. 1. That it is deemed necessary by the council of the city [or village] of....., to have the railway (or a certain portion defined) within the limits of said city [or village] lighted, and that The.....Railroad Company be, and it is hereby required to light its railway within the limits of said city [or village] with..... and erect.....[lamp posts, poles, etc., as required] located as follows: (Give place where posts are to be placed); said..... [lamp-posts, etc.] shall be of..... (describe style of lamp-posts, etc.); and such lights shall be kept burning from.....to..... in each twenty-four hours.

Sec. 2. That the clerk be and he is hereby directed to give notice to the.....Railroad Company of the passage of this ordinance, by delivering a copy thereof to said company or the person or corporation having possession, charge or management of said railway, [or in the manner provided in § 2496 of the Revised Statutes of Ohio] and if said railway is not lighted as herein required within twenty days from the receipt of this notice, said lighting will be done by said city [or village] and the expense thereof assessed against said company in the manner provided by law.

Sec. 3. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed....., 19....

.....,  
President of Council.

Attest:

.....,  
Clerk.

**Sec. 2495 R. S. [Character of the ordinance.]** The ordinance shall specify the manner in which such bridge or railway shall be lighted, the number and style of lamp-posts, gas-posts, electric lights or other lights and fixtures and the time such lights shall be kept burning in each twenty-four hours.<sup>1</sup> [91 v. 147; 66 v. 220, § 430.]

(1) **Character of regulations.**— A city or village has authority to prescribe the kind of light to be used. C. H. and D. R. R. v. Bowling Green, 57 O. S. 336.

But an ordinance providing for electric lighting when municipality contains no electric plant would be an unreasonable burden and void. *Ib.*, 344.



City or village may require railroad company to use the same kind of lamp and illuminating material as used in city or village. *Ib.*

And it may require a light unknown at the time of the enactment of the statute. *C. H. & D. R. R. v. Bowling Green*, 9 C. C. 524, 531.

An ordinance requiring a company to light its tracks and specifying that the lamps shall be lighted the same hours as the lamps of the village, is sufficiently definite. *C. H. and D. R. R. Co. v. Bowling Green*, 57 O. S. 336.

**Sec. 2496 R. S.** [Notice of requirement to light bridge or railway shall be given; time and manner.] Notice of such requirement to light any bridge or railway shall be given at least twenty days before penalty or charge shall be imposed for default, and such notice may be given by delivering to any owner or part owner, or any person having possession, charge or management of such bridge or railway, a written or printed copy of the ordinance,<sup>1</sup> provided, however, that when such ordinance requires the lighting of a railway, service of such written or printed copy of the ordinance upon any ticket or freight agent of such railway company in such city or village, and if there be no such ticket or freight agent in such city or village, upon any ticket or freight agent of such railway company in the county wherein such city or village is located, shall be deemed sufficient and shall charge the person, company, corporation, or partnership, owning or operating such railway with notice of the passage of said ordinance and the requirements thereof.<sup>2</sup> [1902, May 6: 95 v. 369; 66 v. 221, § 431.]

(1) **What notice required.**—An ordinance requiring the lighting of a railway is not rendered void by failure of village to notify company of its intentions. *C. C. C. and St. L. Ry. v. St. Bernard*, 19 C. C. 299.

The notice required must be made only when a penalty or charge is to be imposed for default. *Ib.* See also *C. C. C. & St. L. v. Village of De Graff*, 20 C. C. 710.

**No fixed time for performance necessary.**—§§ 2492 to 2499 R. S. should receive a reasonable construction, and an ordinance will not be held to be defective as failing to fix a specified time for the

performance of such requirement by the company, if its language, taking the ordinance altogether, is sufficiently definite to inform the company that such lighting is required to be done, how it is to be done, and when it is to be done. *St. Mary's v. Railroad*, 60 O. S. 136.

(2) **Service of notice.**—Notice served by sending registered letter with receipt of the addressee, is sufficient. *Bowling Green v. C. H. & D. R. R.*, 10 C. C. 63, 68.

And notice to an officer of the "C. H. & D. Railway Co." instead of Railroad Co. was held sufficient. *Ib.*, 69. See also *C. H. & D. v. Bowling Green*, 9 C. C. 524, 526.

**Sec. 2497 R. S. [Procedure on failure to light bridge or railway.]** If the person, company, or corporation, owning, possessing, or operating such railway or bridge, neglect or fail to do such lighting in conformity with the provisions of the ordinance for twenty days after notice as aforesaid, the council may immediately proceed to cause the lighting to be done at the expense of such person or persons, company, or corporations.<sup>1</sup> [67 (69) v. 47, § 432.]

(1) **Recovery.**—On failure of company to obey ordinance to light, the village may light the track and recover in an action against the company. C. H. and D. R. R. v. Bowling Green, 57 O. S. 336.

A village may recover even though a lamp was not placed on the track, if the track was lighted and although the lamp also lighted a street. The particular location of the lamp is not material if it effect its purpose. C. C. C. and St. L. Ry. v. St. Bernard, 19 C. C. 299. See also C. H. and D. R. R. v. Bowling Green, 9 C. C., 524, 531.

**Municipality may employ private company.**—On failure of railroad company to perform municipality may employ a private company, pay the bill and collect from the company in an action. C. H. and D. R. R. v. Bowling Green, 9 C. C. 524, 530, aff'd 57 O. S. 336.

**Amount assessed presumed right.**—Presumption attaches that the action of council was regular and the amount assessed proper. Village of St. Mary's v. Railroad, 60 O. S. 136, 148.

**Sec. 2498 R. S. [Assessment for expense of such lighting, etc.]** The council may direct the manner in which the expense of lighting such bridge or railway shall be assessed and collected, and when assessed, the amount shall be a debt due against and payable by such person, company, or corporation, and shall be a lien<sup>1</sup> to be enforced as any other lien on such bridge and the land on which the same is built, or upon the real estate of the railway company or leasehold interest situate or being within the county wherein such city or village is located. [67 (69) v. 47, § 433.]

(1) **Expense of lien.**—When, on default of the railway company, the lighting is procured to be done by the council, the expense of such lighting may, by the council, be as-

essed or declared a lien upon any of the real estate of the railway company within the municipality. Railroad Co. v. Sullivan, 32 O. S. 152.

#### FORM OF ORDINANCE TO ASSESS EXPENSE OF LIGHTING RAILWAY.

Ordinance No. ---.

To assess the cost and expense of lighting.....railway within the limits of the city [or village] of.....

Be it ordained by the council of the city [or village] of.....  
 ....., State of Ohio:

Sec. 1. That to pay the cost and expense incurred by the city [or village of....., in lighting the.....railway (or portion thereof, as the case may be) within the limits of said city [or village] in the manner provided in an ordinance No..... passed....., 19...., requiring the..... railroad company to do said lighting, and after the passage of said ordinance, and the failure of said railroad company to comply with its requirements after due notice as required by law, there be assessed on all the real property or leasehold interest of The.....Railroad Company within the county of....., the sum of..... dollars.

Sec. 2. That the amount herein assessed upon the property of said railroad company shall be payable to the treasurer of the said city [or village] within.....days from the passage of this ordinance, and if not paid as herein required, the solicitor is hereby directed to proceed against said company for the sum so due; in the manner provided by law.

Sec. 3. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed....., 19....

.....,  
 President of Council.

Attest:

.....,  
 Clerk.

**Sec. 2499 R. S. [How lien may be enforced.]** The charge may be collected or the lien enforced in the manner pointed out in the chapter providing for the assessment of damages and expenses for making public improvements.<sup>1</sup> [66 v. 221, § 434.]

(1) **Lien, how enforced.**— See H. & D. R. R., 10 C. C. 63. See § C. H. and D. R. R. Co. v. Sullivan, 2286 *et seq.*, R. S. re-enacted in § 32 O. S. 152; Bowling Green v. C. 94 of the Code, page 264.



## IX

STEAM RAILROADS IN MUNICIPAL  
LIMITS.

## 1. GENERAL REGULATIONS.

**Sec. 247a R. S. [Gates, bells, devices or flagmen at crossings.]**

When, in the opinion of the commissioner of railroads, the public safety requires that a gate or gates, automatic alarm-bell, or other mechanical device be erected and maintained at any place where a public road or street is crossed at the same level by any railroad, and which crossing has been declared by said commissioner to be a dangerous one, or that a flagman be stationed and maintained at such dangerous crossing, he shall give the superintendent, manager or other officer in charge of such railroad, a written notice that the same is required, and such company, person or corporation owning or operating such railroad shall erect or station the same within such time thereafter as said commissioner shall prescribe. Any company, person or corporation neglecting or refusing to erect or maintain such gate or gates, automatic alarm-bell, or other mechanical device, or to maintain such flagman, when so required as aforesaid, shall forfeit and pay to the state, for every such neglect or refusal, the sum of one hundred dollars, and the further sum of ten dollars for every day while such neglect or refusal shall continue.<sup>1</sup> [91 v. 353; 86 v. 367.]

(1) **Duties of flagman.**— See Ry. Co. v. Schneider, 45 O. S. 678.

Flagmen and railroad company are chargeable only with ordinary care. Street Ry. Co. v. Murray, 53 O. S. 570, 583.

**Liability of company.**— Persons crossing tracks have right to presume that gateman is exercising due diligence. Ry. Co. v. Schneider, 45 O. S. 678.

Company is liable in damages to

person injured if it fails to exercise due care at crossings. *Ib.*

**Street railway crossing track.**  
— See § (3443-6) R. S. *infra*.

Street railway company employes are not relieved from duty by stopping the car and going forward, as required by § (3443-6) because the flagman has signalled that crossing is open. St. Ry. Co. v. Murray, 53 O. S. 570, 583. § 247a and § (3443-6) are not *in pari materia*. *Ib.*

**Sec. 247b R. S.** [Regulations as to such gates, bells, devices or flagman.] All gates, bells or devices, which by the provisions of this act are under the direction of the commissioner of railroads, shall be built in such a manner, and within such a time, and of such material as shall be approved by the commissioner of railroads, and shall be located on the highway or street, on one or both sides of the railroad track or tracks as the commissioner may deem the public safety to require, and shall be so constructed as, when closed, to obstruct and prevent any passage across such railroad or railroads from the side on which the gate may be located; or said bell shall be made to ring before the approach of each and every train of cars or of a locomotive within three hundred feet of such crossing, or more, according to the speed of the train, and continue to ring until the train of cars or the locomotive shall have reached the crossing. There shall be a person in charge of every such gate and it shall be his duty to close the same at the approach of every train of cars, or of a locomotive, and to keep it open at all other times. In case an automatic alarm bell, or other mechanical device shall be required at any such crossing, it shall be the duty of the railroad company at all times to keep such bell or device in good working order. For every neglect of such duty such person or railroad company, upon conviction thereof, shall pay the sum of twenty-five dollars. When more than one railroad crosses a public highway or street at such dangerous crossing, the expense incurred in the erection and maintenance of gates, bells or device provided for in this section, and of the necessary gatekeepers, or of a flagman, shall be shared equally by the railroad companies alongside whose tracks the gates, bells or device shall be located. Provided that an automatic alarm bell, or other mechanical device as provided for in this and the preceding section, shall not be erected within the limits of any city of the first class or of any city of the first, second, third, and fourth grades of the second class, upon the order of the commissioner of railroads and telegraphs; but nothing herein contained shall prohibit any railroad company from using such automatic alarm bell or other mechanical device, if it desire, at any public railroad crossing not declared dangerous by said commissioner of railroads and telegraphs; and provided further, that where a gate or gates, has or have been erected, and is or are maintained by the railroad company, or where a flagman has been stationed and is maintained by the railroad company, shall not be abandoned, and any automatic alarm bell or other mechanical devices be substituted therefor. [91 v. 353; 86 v. 367.]

**Sec. 247c R. S.** [Gates or flagmen at dangerous crossings in Hamilton; duty of prosecuting attorney.] When, in the opinion of the city council of any city of the third grade *b* of the second class, the public safety requires that a gate or gates be erected and maintained at any place where a public road or street is crossed in said city at the same level by any railroad, and which crossing has been declared by said council to be a dangerous one, or that a flagman be stationed and maintained at such dangerous crossing, council shall give the superintendent, manager or other officer in charge of such railroad, a written notice that the same is required, and such company, person or corporation owning or operating such railroad shall erect or station the same within such time thereafter as council may prescribe. After said notice has been given to the superintendent, manager or other officer in charge of such railroad that the same is required, such railroad company and said council shall agree as to whether said crossing so declared to be dangerous shall be protected by a gate or gates, or a flagman; and if they fail to come to any agreement within ten days, then the question shall be submitted to arbitrators, the council selecting one person, the railroad company one; the two thus selected shall choose a third. The arbitrators thus selected shall decide whether said dangerous crossing shall be protected by a gate or gates, or a flagman, and their decision shall be final. Any company, person or corporation neglecting or refusing to erect or maintain such gate or gates, or to maintain such flagman when so required as aforesaid, shall forfeit and pay to the state for every such neglect or refusal the sum of one hundred dollars, and the further sum of ten dollars for every day while such neglect or refusal shall continue. Provided further, that nothing herein contained shall be construed as conflicting with section 247a. [91 v. 350.]

[§ 2.] It is hereby made the duty of the prosecuting attorney of the proper county, upon being advised of the violation of this act, to immediately commence civil action against said company, person or corporation in the name of the state for the recovery of the forfeitures and penalties imposed in this act. [91 v. 350.]

**Sec. 2500 R. S.** [Regulation of rate of speed.] <sup>1</sup> When a railroad track is laid in a municipal corporation, the council may by ordinance regulate the speed of all locomotives and railroad cars within the corporate limits: provided, such ordinance shall not require a less rate of speed than four miles an hour, and in villages having a population of two thousand or less it shall not be fixed at a less rate than eight miles an hour; and the corporate authorities may by civil action, recover against any engineer, conductor, or company violating such ordinance a



sum not less than five dollars nor more than fifty dollars for each offense.<sup>2</sup> [74 v. 132; § 1; (S. & C. 321).]

(1) **Title, division and chapter.**—This section formed part of subdivision 1, Chap. 5, Div. 8, Title XII, R. S. All sections in the subdivision are repealed except the one here given.

(2) **Liability of company.**—A traveler crossing a railroad track has a right to presume that the company will conform to a regulation, passed by the municipality, prohibiting the running of trains at a greater rate of speed than that named in the ordinance. *Hart v. Devereux, Receiver*, 41 O. S. 565.

The fact that the speed allowed by ordinance is exceeded is not proof

of negligence, but may be considered by the jury on question of negligence. *L. S. & M. S. Ry. Co. v. Johnston*, 25 C. C. 41; 1 C. C. (N. S.) 357; *Meek v. Pennsylvania Co.*, 38 O. S. 632; *Ry. Co. v. Herrick*, 49 O. S. 25, 32; *Bell v. Pistorius*, 18 C. C. 73; and *L. S. & M. S. R. R. Co. v. Ehlert*, 19 C. C. 177; *C. H. & D. Ry. Co. v. Murphy*, 17 C. C. 223; *Watson v. Erie R. R. Co.*, 8 N. P. 18; *Ry. Co. v. Trainer*, 18 C. C. 716; *Railroad Co. v. McCormick*, 24 C. C. 86; *L. S. & M. S. R. R. Co. v. Johnston*, 25 C. C. 41; 1 C. C. (N. S.) 357.

**Sec. 3283 R. S.** [How right to occupy road, street, alley, etc., may be acquired.] If it be necessary, in the location of any part of a railroad, to occupy any public road, street, alley, way, or ground of any kind, or any part thereof, the municipal or other corporation, or public officers or authorities, owning or having charge thereof, and the company, may agree upon the manner, terms, and conditions upon which the same may be used or occupied;<sup>1</sup> and if the parties be unable to agree thereon, and it be necessary, in the judgment of the directors of such company, to use or occupy such road, street, alley, way, or ground, such company may appropriate so much of the same as may be necessary for the purposes of its road, in the manner and upon the same terms as is provided for the appropriation of the property of individuals, but every company which lays a track upon any such street, alley, road, or ground, shall be responsible for injuries done thereby to private or public property lying upon or near to such ground, which may be recovered by civil action brought by the owner<sup>2</sup> before the proper court, at any time within two years<sup>3</sup> from the completion of such track. [54 v. 133, § 12; S. & C. 278.]

(1) **Scope of section.**—This section is not restricted to longitudinal use, and a railroad desiring to cross a street must enter into an agreement or condemn. This section is not limited by § 3284 R. S. *Youngstown v. Railroad*, 3 C. C. 214.

Grant to fix terminus does not include right to cross streets. To do this requires an agreement or condemnation. *Cincinnati Northern R. R. v. Cincinnati*, 8 B. 334.

A city's power over streets is not authorized to be granted away by this section. *Railroad v. Defiance*, 52 O. S. 262.

This section does not give to a municipality the power to agree with a railway company for the permanent and exclusive occupation of a public street with abutments to support an overhead crossing of a railroad, nor can such occupation be rightly gained by means of appropriation. *L. S. & M. S. Ry. Co. v.*

Elyria, 69 O. S. 414; *Cincinnati v. L. & N. R. R. Co.*, 16 Dec. 628; 4 N. P. (N. S.) 217.

As to the effect of § 3337-1 R. S., see *Cincinnati v. L. & N. R. R. Co.*, 16 Dec. 628; 4 N. P. (N. S.) 217.

State board of public works cannot authorize a railroad, under powers conferred by this section, to construct a road on the berm bank of a canal. *State ex rel. v. Railroad*, 37 O. S. 157.

Power to lay a track across a street, conditioned that street be restored to its former state, does not authorize company to appropriate the highway so as to materially interfere with public travel. *Railroad v. Comm'rs*, 31 O. S. 338.

And a municipal corporation cannot grant the exclusive use of streets to one railway company to the exclusion of all others. *Railroad v. Railroad*, 36 O. S. 251.

The municipal corporation cannot fix the compensation to be paid for the use of a track belonging to another corporation. Such compensation must be fixed by a jury. *Ib.*

The city authorities may give permission to lay branch tracks for convenience of shippers. *P. C. & St. L. R. R. v. Cincinnati*, 16 B. 367 (aff'd no report 24 B. 416).

**Occupation of streets by agreement.**—An agreement by a municipality with a railroad granting use of streets, the company agreeing to make and gravel streets, cannot be rescinded without consent of railroad, and railroad is not released from making streets. *Railway v. Carthage*, 36 O. S. 631.

Railway company must make street in a reasonable time or a right of action accrues to municipality, and this without notice. *Ib.*

The manner of use may be prescribed by municipality and must be observed by court unless fraudulent. *Sargent v. O. & M. R. R.*, 1 Handy 52.

But a condition cannot be attached by a municipality compelling the railroad to keep a watchman at a crossing. *Ravenna v. Pennsylvania Co.*, 45 O. S. 118, 123.

The county commissioners are authorized by this section to contract with a railroad company as to the manner, terms, and conditions upon which said company shall occupy a portion of a public road. *Megruer v. Comm'rs*, 15 C. C. 242.

If a railroad company cannot agree with the authorities of a municipal corporation, it may resort to the courts, in accordance with the terms of the provisions of §§ 6414-6453 R. S. *State ex rel. v. Railway*, 37 O. S. 157, 170.

## (2) Rights of abutting owners.

—An abutting owner has a right of action for unlawfully interfering with travel on a street. *Little Miami R. R. v. Naylor*, 2 O. S. 235. See also *Parrott v. C. H. & D. R. R.*, 10 O. S. 624.

But he has no right of action where he with others of the community are inconvenienced by noise, smoke, and vapors. A railroad is not a private nuisance. *Parrott v. C. H. & D. R. R.*, 10 O. S. 624; *Fliehm v. C. C. C. & St. L. Ry.*, 27 B. 302.

But substantial injury from smoke, noise, and vapors not common to the community may be considered. *Railway v. Gardner*, 45 O. S. 309. See also *C., I., St. L. & C. Ry. v. Pfitzer*, Goebel, 248; *W. & L. E. R. R. v. McLaughlin*, 15 C. C. 1.

And a person whose property is not on the same street as the railway may recover under this section. *Shepherd v. B. & O. R. R.*, 130 U. S. 426; *W. & L. E. R. R. v. McLaughlin*, 15 C. C. 1; *Railroad v. Mowatt*, 35 O. S. 284.

Property situated fifty feet from railroad is "near to" such railroad within meaning of this section. *Toledo Ry. & T. Co. v. Meinen*, 27 C. C. 208; 6 C. C. (N. S.) 377.

Claim for damages is a personal one and is not assigned by a conveyance of the land. *Railroad v. Campbell*, 51 O. S. 328.

When railroad occupies a highway, but not in a way provided by this section, the abutting owner,

having the fee in the lands covered by the highway, may bring an action to compel railroad company to appropriate. *Railroad v. Williams*, 35 O. S. 168.

And he has a right to damages for a change of grade of street by the railroad. *Railroad v. Hambleton*, 40 O. S. 496.

As to abutting owner's right to enjoin construction of railroad in street, where his property rights are about to be taken, see note "Use granted to railroad," under § 28 of the Code.

As to abutting owner's rights against the municipality for injury to his property abutting on the street caused by a railroad constructed under municipal authority, see note, "Use granted to railroad," under § 28, page 113.

The section, 3283 R. S., gives a right only where railway is constructed in street. No right is given where railway is on company's own right of way. *Cincinnati, etc., R. R. Co. v. Burski*, 4 C. C. (N. S.) 98; 26 C. C. 486. See also *Ross v. Railway*, 27 C. C. 135; 5 C. C. (N. S.) 565 (aff'd 74 O. S. —).

(3) **Limitation of actions.**—The limitation of two years applies to incidental injuries. The limitation for taking property is twenty-

one years. *Railroad Co. v. O'Harra*, 48 O. S. 343.

And the limitation begins to run when the track is completed and ready for use. *Railway v. Gardner*, 45 O. S. 309, 325.

Suit for damages for change of grade must be brought within two years. *Railroad v. Mowatt*, 35 O. S. 284.

Failure to begin suit within two years does not extinguish right of action, and unless the question is raised by answer or demurrer the lapse of time is waived. *Railroad v. Lersch*, 58 O. S. 639.

Limitation of two years does not apply when company is unlawfully in the street. *Railroad v. Cobb*, 35 O. S. 94.

See further as to limitation of actions. *Railroad v. Hambleton*, 40 O. S. 496.

**Evidence.**—It is error to allow a witness to testify how much less per year was received as rent for the property affected since, than before the track was laid in front of it. *Railway v. Gardner*, 45 O. S. 309.

The measure of damages is the difference in value of the property before and after the alleged injury from cinders, noise, smoke, etc. *Toledo Ry. & T. Co. v. Meinen*, 27 C. C. 208; 6 C. C. (N. S.) 377.

### **Sec. 3284 R. S. [May divert road or stream when necessary.]**

A company may, whenever it is necessary in the construction of its road to cross a road or a stream of water, divert the same from its location or bed;<sup>1</sup> but the company shall, without unnecessary delay, place such road or stream in such condition as not to impair its former usefulness,<sup>2</sup> and any or all railroads hereafter constructed, which shall cross any avenue or public highway leading from a city of the first or second class to a public cemetery of such city, situate within or without the limits of any such city, shall be constructed so as either to pass under or over such avenue or public highway, at such elevation or depression as the case may be, as will allow the



unobstructed passage of all wagons, carriages, or other vehicles which it may be necessary for any person to use upon such avenue or public highway.<sup>3</sup> [50 v. 274, § 16; S. & C. 279.]

(1) **Railway diverting road.**— Under this section railroad may divert a highway, but it must put the same in good condition, and is liable for its failure to do so. *Railway v. Maurer*, 21 O. S. 421; *Potter v. Bunnell*, 20 O. S. 150.

This provision is substantially the common law rule. *Railroad v. Defiance*, 52 O. S. 262, 314.

The right of a railway to use its road at a crossing of a highway, and the right of public to use highway, are equal. Reasonable care and prudence must be used by each. *Railroad v. Maurer*, 21 O. S. 421.

When it becomes necessary to divert a stream, the railroad may appropriate land for the new channel. *Railway v. Bohm*, 34 O. S. 114.

(2) **Restoring highway.**— The requirement that railroad place a highway "in such condition as not to impair its former usefulness" is a condition continuing as long as the company enjoys its franchise. *State v. Railroad*, 36 O. S. 434.

The attorney general may enforce the condition, *Id.*; and court may enjoin company from using highway when it has been diverted and left in a dangerous condition. *Id.*

The right of the state is not affected by power given to county

commissioners under § 863 R. S. *Id.*

If the company occupying the street refuses to restore it to its former usefulness to the public, it may be compelled to do so by mandatory injunction without compensation for the expense of removal. *L. S. & M. S. Ry. Co. v. Elyria*, 69 O. S. 414.

The company being compelled to remove an obstruction which it has placed in the street, cannot claim that such removal is taking its property without due process of law. *Id.*

(3) **Crossing highway.**— The crossing of city streets without consent of municipal authorities was not intended by this section. *Railroad v. Cincinnati*, 8 B. 334. See also *Youngstown v. Railroad*, 3 C. C. 214.

The railroad company is responsible for the negligence of its agents. This section imposes a personal duty. *Railroad v. Van Dorn*, 1 C. C. 292.

And where it agrees to keep a bridge in repair, is jointly liable with the city for failure to do so. *Toledo Consolidated St. R. R. v. Sweeney*, 8 C. C. 298 (aff'd, 52 O. S. 616).

**Sec. 3310—1 R. S.** [Electricity as motive power upon railroads.] Upon any railroad heretofore or hereafter constructed in this state, electricity may be used as a motive power in the propulsion of cars; provided, however, that before any line of poles and wires shall be constructed through or along the streets, alleys or public grounds of any municipal corporation, plans of such construction shall be submitted to and approved by the council of such municipal corporation. [91 v. 397.]

**Sec. 3320 R. S.** [Passenger trains must stop at certain stations.] Each company shall cause three, each way, of its regular trains carrying passengers, if so many are run daily, Sundays excepted, to stop at a station, city, or village, containing over three thousand inhabitants, for a time sufficient to receive and let off passengers; if a company, or any agent or employe

thereof, violate, or cause or permit to be violated, this provision, such company, agent, or employe shall be liable to a forfeiture of not more than one hundred nor less than twenty-five dollars, to be recovered in an action in the name of the state, upon the complaint of any person, before a justice of the peace of the county in which the violation occurs, for the benefit of the general fund of the county; and in all cases in which a forfeiture occurs under the provisions of this section, the company whose agent or employe caused or permitted such violation shall be liable for the amount of the forfeiture, and the conductor in charge of such train shall be held, *prima facie*, to have caused the violation.<sup>1</sup> [1889, April 13: 86 v. 291; Rev. Stat. 1880; 64 v. 142, § 26; (S. & S. 114; S. & C. 282).]

(1) **Validity.**—This section does not violate the provisions of the commerce clause of the U. S. Constitution. *R. R. v. State*, 8 C. C. 220 (aff'd, 37 B. 196).

make regulations as to stoppage of trains is subject to legislative control, and to such a provision as in this section. *Penn. Co. v. Wentz*, 37 O. S. 333.

The power of the company to

**Sec. 3337—1 R. S. [Railroad bridges over highways.] § 1.** It shall be unlawful for any person, company or corporation owning or operating any railroad, crossing, or that may hereafter cross, over and above any street, less than seventy feet in width, in any city in this state, at an elevation above such street, sufficient to permit persons to pass and repass along such street beneath such railroad crossing, to place or cause to be placed, or to suffer or permit to be or remain in such street, beneath such railroad crossing or bridge, any pier or other stay or support for such crossing or bridge unless the placing and maintaining of the same be authorized by the city in which such crossing is situated, by ordinance duly passed,<sup>1</sup> or to suffer or permit any such railroad crossing or bridge to be or remain in such condition, that any iron, coal, or other hard substance, or any fluid or noisome matter, may fall or drop from or through any such crossing or bridge, upon persons traveling or passing beneath the same; and any such person, company or corporation owning or operating any such railroad, failing to comply with the requirements of, or violating any of the provisions of this section, shall, for each and every day during the continuance of such failure or violation, and on account thereof forfeit and pay to such city the sum of one hundred dollars, which may be recovered in a civil action, in the name of such city, against the owner or operator of such railroad, or both, as the city may elect, and thereafter like recovery may be

had in like manner, for subsequent failures and violations aforesaid. [1904, April 23, 97 v. 301; 86 v. 197.]

(1) **Viaduct in street**, even with ipality to give such consent is consent of municipality, would be a shown. *Alexander v. Ry. Co.*, 2 N. nuisance unless authority of munic- P. (N. S.) 59; 14 Dec. 102.

**Sec. 3337—2 R. S.** [Council may prohibit switching, obstructing, whistling, etc.] § 2. That the city council of any city may prohibit the switching of freight engines, trains, or cars, over or on said crossing or bridge, the sounding of locomotive steam whistles, on or near the same, and the standing or stopping of any railroad engine over or on the same, and may, by ordinance, constitute the same an offense, and provide for the punishment of any person committing such offense. [86 v. 197.]

**Sec. 3337—3 R. S.** [Railroad companies must build and maintain highway crossings, etc.] § 1. All railway or railroad companies operating a line or lines of railway in this state, shall build or cause to be built, and keep in repair good and sufficient crossings over, or approaches to such line or lines of railway, its tracks, sidetracks and switches, at all points where any public highway, street, lane, avenue, alley, road or pike is now or may hereafter be intersected by such lines of railway, its tracks, sidetracks or switches. And also good and sufficient sidewalks on both sides of streets intersected by their roads, the full width of the right of way owned, claimed or occupied by them; and as to crossings and approaches outside of municipal corporations, the township trustees shall have power to fix and determine the kind and extent thereof, and the time and manner of constructing the same; and as to crossings, approaches and sidewalks within municipal corporations, the municipal councils shall have and exercise the same powers as trustees concerning crossways and approaches outside of municipalities, and such crossways, approaches and sidewalks shall be constructed, repaired and maintained by the railroad companies as so ordered. [88 v. 261.]

**Sec. 3337—4 R. S.** [Service of notice on railroad companies.] § 2. It shall be the duty of the officer or officers having charge of any public highway, street or alley intersected by any line of railway, to serve a written notice upon the nearest station agent or section foreman having charge of that portion of the railway where such intersection occurs, that such crossing, approach or sidewalk as herein described shall be built or repaired, setting forth the kind and extent thereof, and time and manner of constructing the same, as ordered by the council or trustees. [88 v. 261.]

**Sec. 3337—5 R. S.** [When crossing, etc., must be completed, etc.] § 3. It shall be the duty of any railway company so noti-



fied, to comply with said notice within a period of thirty (30) days from and after receiving such notice, and on failure so to do, the township trustees, or council as the case may be, may cause such crossing, approach or sidewalk to be constructed or repaired as before ordered, and may recover the cost of so doing with interest thereon, in a civil action against the railroad company, in the name of the trustees or municipality as the case may be, before any court of competent jurisdiction. [88 v. 261.]

**Sec. 3337—6 R. S. [Crossings must be kept clear of snow.]**

§ 4. It shall be the duty of all railway companies owning or operating any line of railway within the limits of the state of Ohio to, at all times, to keep all public highways now or hereafter crossing such line of railroad, clear of snow, so that the same shall at all times be in a safe and convenient condition for travel for a distance of fifty (50) feet each way from the center of said railroad along such highway. [88 v. 261.]

**Sec. 3337—7 R. S. [Penalties.]** § 5. Any railroad company which shall neglect to comply with the terms of this act, shall be liable to pay damage to the city, village, town or township in which the highway is situated in the sum of thirty (\$30) dollars for such neglect, and a further sum of ten (\$10) dollars per day for each and every day such railroad company fails or neglects to comply with the terms of this act, the same to be recovered in an action brought in the name of the city, village, town or township as the case may be. It is hereby made the duty of the prosecuting attorney of the county to prosecute to judgment any claim arising under the foregoing provisions, without any charge to the said city, village, town or township.<sup>1</sup> [88 v. 261.]

(1) **Remedy not exclusive.**— violation if city refuses. Alexander  
Remedy provided in this section is v. Ry. Co., 14 Dec. 102; 2 N. P.  
not exclusive and public may sue for (N. S.) 59.

**Sec. 3337—18 R. S. [Required height of bridges, etc., over railroad tracks; cost.]** § 1. All bridges, viaducts, overhead roadways or foot-bridges, wire or other structure hereafter constructed over the track or tracks of any railroad or railroads within the state of Ohio, by any county, municipality, township, railroad company, or other private corporation or person shall be of such height as to be not less than twenty-one feet in the clear from the top of the rails of said track or tracks, to said wire and other structure or to the bottom of the lowest sill, girder or cross-beam, and the lowest downward projection on such bridge, viaduct, overhead roadway or foot-bridge, except in cases where the commissioner of railroads and telegraphs shall find such construction is impracticable, and in every such case said commissioner shall file a written statement in

his office setting forth the facts relied upon by him in making such finding. But this provision shall not apply to any main track. Provided, that where any bridge, viaduct, overhead roadway or foot-bridge over a railroad track or tracks is rebuilt, it shall be brought under the provisions of this act, and in such case, if said structure is at, or in line of, a public street or highway, and is thus erected above the grade of any such street or highway and any cross-street or streets, the cost of making such street or streets or highway or highways conform to such new grade, and all damages to owners of property abutting on such street or streets, highway or highways, because of such change of grade, shall be ascertained and determined, and paid as follows: Said or any railroad company or its assigns shall pay all costs or damages resulting as aforesaid, from the raising or building of any of its bridges or structures, as aforesaid, in the line of any street or highway at a greater height than before the passage hereof; and if such company is only part owner of any such structure it shall pay its proportionate share of the cost of such change of grade and damages. Should a railroad company, or its assigns, raise the grade of its track or tracks under any of said structures not owned by it after the passage of this act, thereby causing any said bridge or structure to be put at a higher grade when rebuilt, said company shall pay all costs and damages as aforesaid made necessary thereby. [94 v. 297; 91 v. 365.]

**Sec. 3337—19 R. S. [Enforcement of act; penalty; injunction.]**

§ 2. It is hereby made the duty of the commissioner of railroads [and] telegraphs to see that the provisions of this act are carried into effect; and every railroad company in the state of Ohio, public or private corporation, or person building, or permitting to be built, any bridge, viaduct, overhead roadway or foot-bridge, or wire and other structure as specified in section one [§ (3337—18)] of this act, shall file with the said commissioner plans and specifications, and first receive from him a permit before being allowed to proceed with said structure and the erection of said wire. Any person, corporation, public or private, violating the provisions of this act, upon conviction before a court of competent jurisdiction, shall be fined any sum not less than one hundred nor more than one thousand dollars; and every day that said structure or wire, not in conformity with the provisions of this act, is permitted to remain, shall constitute a separate offense. The observance of the provisions of this act may be enforced by injunction on complaint of any person, corporation or board interested therein. [91 v. 365.]

**Sec. 3339 R. S. [When tracks must be used in common.]**

When two or more companies have, in the same street, alley, public way, or opening, two or more tracks of the same gauge, through a city or village, the council of such city or village may require such companies to use such tracks in common, and to pass their locomotives and cars over each track in one direction only. [54 v. 133, § 4; S. & C. 325.]

**Sec. 6980a R. S. [Unlawful use or occupation of highways by railway companies in Cincinnati, Cleveland and Springfield.]** It shall not be lawful in cities of the first and second grades of the first class and cities of the third grade *a* of the second class for any railroad company, superintendent, agent or other employe thereof, either directly or indirectly, to obstruct, use or occupy any street or other public highway with any locomotive, cars, cars or train, by permitting or suffering such locomotive, car, cars or train to remain upon the crossing by any railroad of such street or other public highway, or any part thereof, or by coupling, switching or shifting of locomotives, cars or trains, or the making up of trains across such street or other public highway, or any part thereof, or by moving or stopping long freight trains across the same, for a period longer than four minutes at one time; and whenever any such street or other public highway has been thus obstructed, used or occupied, it shall not be lawful for any railroad company, superintendent, agent or other employe thereof, either directly or indirectly to so obstruct, use or occupy the same, or any part thereof, for a period of five minutes thereafter;

**[Bars or gates and watchmen in Cincinnati and Cleveland.]** And in cities of the first and second grades of the first class any railroad company or companies so using such street or other public highway, during said period of four minutes, shall provide and maintain suitable bars or gates, and watchmen at such street or other crossings, to secure and warn the public against the dangers attending such use;

**[Penalty.]** And if any railroad company, superintendent, agent or other employe thereof shall, either directly or indirectly, obstruct, use or occupy such street or other public highway in violation of the aforesaid provisions and prohibitions of this section, or shall procure, direct, aid or abet in any such violation, he or they shall be fined not more than one hundred nor less than twenty dollars, or imprisoned not more than thirty days, or both.

**[First right to use or occupancy.]** It is further provided, that after the expiration of said period of five minutes, any railroad



company other than the one last using such street or public highway, shall have the first right to use or occupy the same for a period not to exceed four minutes;

[**Regular trains.**] And provided further, that nothing herein shall be so construed as to affect or interfere with the arrival and departure of regular railroad trains moving across such street or other public highway at a rate of speed not to exceed six miles per hour; or to any regular passenger train occupying any such street or highway for a period less than ten minutes, for the purpose of discharging or taking on passengers and baggage at any of its regular passenger stations. [90 v. 188; 85 v. 113.]

[**Sec. 3333—1a.**] [Common pleas court given jurisdiction to ascertain and define manner in which one steam railroad shall cross another within corporate limits; change of grade; right to appeal.] That where it becomes necessary, within the corporate limits of a city or village, for the track of a steam railroad company to cross the track of another steam railroad company unless the manner of such crossings shall be agreed to between such companies, it shall be the duty of the court of common pleas of the county wherein such crossing is located, or a judge thereof in vacation, on application of either party, to ascertain and define by its decree the mode of such crossings which will inflict the least practical injury upon the rights of the company owning or operating the road which is intended to be crossed; and, if in the judgment of such court or such judge thereof, it is reasonable and practicable to avoid a grade crossing, it shall by its process prevent a crossing at grade; but in changing the grade of any steam railroad, no grade shall be required to exceed the established maximum or ruling grade governing the operations by engines of that division or part of the railroad on which the improvement is to be made, without the consent of the railroad company, nor shall the railroad company's tracks be required to be placed below high water mark. The court shall, in its order, equitably apportion the initial expense of such construction or crossing and the expense of maintenance thereof among the parties interested. Any party feeling itself aggrieved by the decision of said court shall have the right of appeal as in other civil cases. Nothing in this act shall prevent any railroad company from laying additional tracks at existing crossings. [1904, May 3, 97 v. 537.]

An act to provide how railroad and highway crossings may be constructed.

[**Sec. 1.**] [Railroad and highway crossings shall be above or

**below grade.]** Except as in this act elsewhere provided, all crossings, hereafter constructed, whether of highways by railroads, or of railroads by highways, shall be above or below the grade thereof.

**[Sec. 2.] [Railroad crossing.]** Every railroad company constructing a new line of railroad, under its charter powers, across a highway, shall construct the same above or below the grade of the highway, unless permitted in the manner hereinafter provided, to construct the same at grade; and such railroad company may exercise the power contained in its charter and the general laws, for altering the grade and location of highways in order to avoid grade crossings.

**[Sec. 3.] [Highway crossings.]** Every municipality or other authority hereafter constructing a highway across an existing railroad, shall construct the same above or below the grade thereof, unless permitted in the manner hereinafter provided, to construct the same at grade, and the cost of said work shall be paid, one-half by said municipality, and one-half by the railroad company owning said railroad.

**[Sec. 4.] [When such crossings may be at grade; common pleas court given jurisdiction to determine.]** Whenever it shall be desired by any railroad company constructing a new railroad, or by any municipality or authority constructing a new highway that the railroad or highway should be so constructed that the railroad and highway shall cross each other at the same grade, a petition shall be presented by the party desiring such construction to the court of common pleas of the county within which said crossing is situated upon ten days' notice to the corporation owning said railroad, or to such municipality or authority, describing the proposed construction, and setting forth the reasons that are supposed to make the same necessary or desirable; and the court of common pleas shall thereupon have jurisdiction of the parties and the subject matter of such petition, and may proceed, summarily or otherwise, and upon such notice as it shall deem sufficient, to examine the matter, either by evidence, by reference to a master commissioner or otherwise; and, if satisfied that such construction is reasonably required to accommodate the public, or to avoid excessive expense, in view of the small amount of traffic on the highway or railroad, or in view of the difficulties of other methods of construction, or for other good and sufficient reasons, then it shall make an order or orders permitting such crossing at grade to be established; and it may, in such order, in its discretion, prescribe that gates, signals, or other safeguards shall be maintained by the railroad company, in addition to the signals and safeguards prescribed by statute, and

all such orders shall be binding upon the parties and shall be observed by them. All costs and expenses of the proceedings shall be ascertained and allowed by the court of common pleas and shall be paid by such party as it shall decide, or by it apportioned between the parties, and may be collected by execution out of said court.<sup>1</sup>

**Applies to steam railroads only.**—*In re A. B. & S. Ry. Co.*, 16 Dec. 87; 3 N. P. (N. S.) 561.

**Power of court.**—Determination by court does not dispense with agreement with municipality or condemnation. *Ib.*

[Sec. 5.] [Right of appeal.] Either party feeling itself aggrieved by the decision and order of said common pleas court shall have the right of appeal, as in other civil cases.

[Sec. 6.] [Additional tracks, switches, etc.; how constructed.] Nothing in this act shall prevent any railroad company from laying additional tracks at crossings previously existing, or from constructing switches, sidings and branch lines from their lines of railroad now or hereafter constructed to any mill, factory, or other manufacturing establishment, or other industrial plant, or any elevator, wharf or pier, or gravel, marl, or clay bed, or any mine, or from laying additional track to increase their yard facilities at terminal or other points across public highways at the grade thereof, but such signposts and signals shall be employed for the protection of such crossings as are by law prescribed for railroad crossings of public highways. [1904, May 3, 97 v. 546.]

## 2. ABOLISHING GRADE CROSSINGS.

**An act to abolish grade crossings in municipal corporations.**<sup>1</sup>

[Sec. 1.] [Grade crossings in municipalities; municipalities may abolish.] Any municipal corporation may raise or lower, or cause to be raised or lowered, the grade of any street or way above or below any railroad tracks therein, and may require any railroad company operating a railroad in such municipality to raise or lower the grade of its tracks and may construct ways or crossings above the tracks of any railroad, or require the railroad company to construct ways or crossings that are to be passed under its tracks, whenever, in the opinion of the council, board of legislation or other legislative body the raising or lowering of the grade of any such railroad tracks, or the raising or lowering or construction of such ways or crossing may be necessary, upon the terms and conditions hereinafter set forth in this act.

(1) **Other provisions** applying to both municipalities and counties and relating to grade crossings are contained in § (3337—8) to (3337—17) R. S., inclusive. These sections are probably superseded by

the present act so far as they relate to municipalities.

**Constitutionality** of this act declared. *East End B. & T. Co. v. Cleveland*, 14 Dec. 33.



[Sec. 2.] **[Preparation of plans and specifications by railroad company and city engineer.]** The council, board of legislation or other legislative body of any such municipality, for the purpose of making or causing any such improvement to be made, may, by ordinance, require the railroad company, in co-operation with the engineer of such municipality, or the engineer designated in said ordinance by the council, board of legislation or other legislative body, to prepare and submit to said council, board of legislation or other legislative body, within six months, unless longer time is mutually agreed upon, plans and specifications for such improvement, specifying the grades to be established for the streets, and the height, character and estimated cost of any viaduct or any way above or below any railroad tracks, and the change of grade required to be made of such track, including side tracks and switches; but in changing the grade of any railroad, no grade shall be required to exceed the established maximum or ruling grade governing the operations by engines of that division or part of the railroad on which the improvement is to made, without the consent of the railroad company, nor shall the railroad company's tracks be required to be placed below high water mark.

**[Preparation of such plans and specifications by city engineer upon refusal of railroad company to co-operate in preparation; duty of Circuit Court as to settlement of differences between railroad company and city.]** If at the expiration of said six months the railroad company shall have refused or failed to co-operate in the preparation of said plans and specifications, the engineer of such municipality, or the engineer designated by said council, board of legislation or other legislative body, is hereby empowered to prepare and submit same to said council, board of legislation or other legislative body, and if said plans and specifications are not satisfactory to said council, board of legislation or other legislative body and said railroad company, and cannot be made so by mutual agreement within a further period of three months, and in the event that either the municipality or the railroad company shall not consent to the making of such improvements according to the plans and specifications submitted, then and in that case said plans and specifications, together with the points of difference between the council, board of legislation or other legislative body and the railroad company may be submitted by either party to the circuit court having jurisdiction in the county in which said municipality is situated, which court shall, after examination of such plans and specifications, and after hearing the evidence, make a finding as to whether or not the public safety

requires such improvement to be made, and whether or not said plans and specifications are reasonable and practicable; and if such court finds such improvement is necessary to the public safety, and that the plans are reasonable and practicable, the municipality shall be required to make such improvements to its streets as may be necessary, and the railroad company be required to make the changes necessary to its tracks and roadbed, in order to comply with the rulings of the court; but if the court finds that the improvement is not necessary to the public safety, or that the plans and specifications are not reasonable and practicable, then the improvement shall not be made upon said plans. And if more than one railroad company owns tracks on the crossing in question, then the said circuit court shall apportion the part of the expense payable by the railroad companies between or among the said railroad companies. The word "company" in this act is intended to include also the words "company or companies."

[Sec. 3.] [Apportionment of cost between city and railroad company.] The cost of the construction of the improvement authorized, including the making of ways, crossings or viaducts, above or below the railroad tracks, and also including the raising or lowering of the grades of the railroad tracks and side tracks for such distance as may be required by such municipality and made necessary by such improvement, together with the cost of any land or property purchased or appropriated, and damages to owners of abutting property, or other property, shall be borne one-half by any such municipality and one-half by any such railroad company or companies; and any such municipality shall have the right of action against any such railroad company for the recovery of the one-half of such costs payable by such railroad company with interest from the time they become due; and any such municipality and railroad company may agree as to what part of such work shall be done by such railroad company, and also fix the amount which shall be allowed or credited to such railroad company for doing such work; and such railroad company shall be entitled to deduct from half the cost of such improvement the expense and costs incurred by it in the change of its grade required by such municipality or made necessary by such improvement under such specifications, but only in case the amount of such cost and expense has been agreed upon in writing between the municipality and the railroad company, and if the amount of work that may be done by the railroad company, or made necessary by reason of such change of grade on lowering or raising its tracks, exceeds one-half of the cost of the improvement, then such railroad company shall have

the right to recover the amount with interest in excess of one-half the costs and expenses, in an action at law against such municipality,

[**Notice of intention to make improvement.**] provided however that before any work shall be done which may be required in the making of such proposed improvement, the council, board of legislation or other legislative body of said municipality shall by ordinance or resolution require notice of its intention to make such improvement in accordance with said plans and specifications to be given, after the manner provided by section 52 of an act entitled "An act to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent the abuse of such powers, as required by the constitution of Ohio, and to repeal all sections of the Revised Statutes inconsistent herewith," passed October 22, 1902, as amended April 21, 1904, to the owner of each piece of property abutting upon any street, highway, or public place, the grade of which will be changed by the said proposed improvement;

[**Claims for damages and judicial inquiry thereinto.**] and the provisions of said section 52 and of section 54 of said act, as amended April 21, 1904, relating to the manner of service of notice, the filing of claims for damages, and the effect of failure to file such claims, shall apply to the notice herein provided and to all claims for damages by reason of the said proposed improvement, and after the expiration of the time provided by said section 54 of said act, as amended April 21, 1904, for the filing of such claims, the council, board of legislation or other legislative body of said municipality, when claims have been filed within the time limited by said section, shall determine by ordinance or resolution whether said claims shall be judicially inquired into, as hereinafter provided, before commencing, or after the completion, of the said proposed improvement; and, thereupon, the mayor or solicitor shall make application for a jury, in the manner provided by section 56 of said act and by section 2321, Revised Statutes, to the court of common pleas, or to the probate court, of the county in which said municipality, or the larger part of it, is situated, either before commencing, or after the completion of said improvement, as the said council, board of legislation, or other legislative body shall determine, and all proceedings upon such application shall be governed by the laws relating to the applications provided for by said section 56 of said act and by said section 2321, Revised Statutes.

[**Mode and time of payment of railroad company's proportion of cost.**] And the council, board of legislation, or other legislative body of said municipality, may by ordinance pre-



scribe the mode and time or times of payment by said railroad company or companies of the proportion of the cost of said improvement which said railroad company or companies shall be required to pay. [1906, April 16, 98 v. 191; 95 v. 356.]

[**Sec. 4.**] [**Height of viaducts.**] Any way, crossing or viaduct so constructed over any railroad track or tracks in any municipality shall be of such height as not to be less than twenty-one feet in the clear from the top surface of the rails of the railroad track to the lowest point or projection of such overhead way, crossing or viaduct, unless such company shall consent to or the circuit court order a less height, but in no event shall said circuit court order a less height than sixteen feet and three inches.

[**Sec. 5.**] [**How necessary land acquired.**] The land or property required to make any alterations in the street or highway necessitated by the proposed improvement shall be purchased or appropriated by the municipality or company after the manner provided by law for the appropriation of private property for public use, and the land or property required to make any alteration in the railroad or railroads necessitated by the proposed improvement shall be purchased or appropriated by the railroad company or companies after the manner provided for the appropriation of private property by such corporation; but the municipality shall not appropriate land held or owned by any railroad company necessary for the use of such railroad company in maintaining and operating its road.

[**Sec. 6.**] [**Cost of maintenance, how borne.**] After the completion of the work the crossings and the approaches shall be kept in repair as follows: When the public way crosses a railroad by an overhead bridge, the cost of maintenance shall be borne by the municipality. When the public way passes under the railroad the bridge and its abutments shall be kept and maintained by the railroad company, and the public way and its approaches shall be maintained and kept in repair by the municipality in which they are situated.

[**Sec. 7.**] [**Bond issue to pay city's share of such improvement; tax levy.**] For the purpose of raising the money to pay the proportion of the cost of such improvement payable by the municipality, the bonds of the municipality may be issued to the necessary amount, which bonds shall be of such denomination and payable at such place and times as the council, board of legislation or other legislative body may determine, and shall bear interest not exceeding four per cent. per annum, and shall not be sold for less than their par value. A tax on the taxable property of the municipality in addition to all other levies now allowed by law may be levied to pay the principal and interest of the bonds as the same may mature. Af-

ter the completion of the improvement a tax in addition to all other levies allowed by law may be levied by the municipality to pay the cost of maintaining and keeping in repair that part of the work required to be maintained and kept in repair by said municipality.

[Sec. 8.] [Street railway companies to bear share of expense of making such improvements.] In case the track or tracks of any street railway company or companies within the limits of any municipality where the improvements authorized by this act are made shall cross at grade or otherwise a public street or the right of way of any railroad company or companies at a point where, under the plans and specifications provided for in this act, it has been determined to construct the said improvements, the municipality shall have power by ordinance to require such street railway company or companies to bear a fair and reasonable proportion of the cost assumed by said municipality in the making of said improvement, not exceeding one-half the portion payable by said municipality; and the municipality shall have the right of action against any such street railway company or companies for such proportion of the said cost as said ordinance shall require said company or companies to bear, and such proportion of said cost shall be a lien upon all the property, both real and personal, of the said company or companies, situated in the county in which the municipality is situated from and after the date of the passage of said ordinance; provided, however, that said street railway company or companies shall keep in repair at its or their own expense all tracks affected by such improvement and all construction work of whatever character which may be necessary to support such tracks. And the council, board of legislation, or other legislative body of said municipality may by ordinance provide the mode and time or times of payment for the proportion of the cost of said improvement to be borne by said street railway company or companies. [1906, April 16, 98 v. 192; 95 v. 356.]

[Sec. 9.] [Repeals.] All acts and parts of acts in conflict or inconsistent with this act are hereby repealed. [1902, May 2, 95 v. 356.]

### 3. UNION DEPOT COMPANIES.

Sec. 3446 R. S. [Who may file articles of incorporation.] The presidents of two or more railroad companies running railroads to the same city, town, or village, may, by the consent and under the direction of their respective boards of directors, file articles of incorporation in the office of the secretary of state, for the purpose of purchasing depot grounds, and locating, constructing, and maintaining a common or union station house

and passenger depot, and a union railroad by two or more tracks connecting the railroads of such companies for business purposes.<sup>1</sup> [65 v. 63, § 1; S. & S. 122.]

**Control of depot property.**— Depot company may grant exclusive privilege to transfer company for hack stand. *State ex rel. v. Depot Co.*, 71 O. S. 379.

**Terminal railroad companies** authorized under general railroad laws. See *State ex rel. v. Union Terminal R. R. Co.*, 72 O. S. 455.

#### 4. RAILROADS OWNED BY MUNICIPALITIES.

##### THE CINCINNATI SOUTHERN RAILROAD.

1. Act authorizing construction and bond issue of \$10,000,000; trustees; appropriation of land, etc. 66 O. L. 80.

Held constitutional. *Walker v. Cincinnati*, 1 C. S. C. R., 121; affirmed, 21 O. S. 14. But see *Ry. Co. v. Martin*, 53 O. S. 386; *Taylor v. Commissioners of Ross County*, 23 O. S. 22; *Wyscaver v. Atkinson*, 37 O. S. 80; *Counterman v. Dutlin Tp.*, 38 O. S. 515.

2. Act authorizing city to advance funds to trustees. 67 O. L. 28.

This act was also involved in *Walker v. Cincinnati*, 21 O. S. 14.

3. Act relating to rights of bondholders and authorizing trustees to complete and lease the road. 70 O. L. 139.

4. Act authorizing trustees to borrow six million (\$6,000,000) dollars more and to issue bonds therefor upon a vote of the people. 73 O. L. 13.

Upheld in *Thoms v. Greenwood*, 7 Am. L. Rec. 320½; affirmed by the Supreme Court 3 B. 157.

5. Act authorizing trustees to contract for completing and leasing the road. 74 O. L. 115.

6. Act authorizing trustees to borrow two million (\$2,000,000) dollars more upon a vote of the people, and providing for terminal facilities right to use streets and lease of finished parts of road. 75 O. L. 115.

The vote on this question was against the bond issue, and thereupon the succeeding act of May 15, 1878 was passed.

7. Act authorizing trustees to borrow \$2,000,000 more, upon a vote of the people, and to contract to complete the road. 75 O. L. 559.

In a suit to enjoin the performance of the contract made in pursuance of the above act and to enjoin the issuance of the bonds therein authorized, the constitutionality of the original Southern Railway act of May 4, 1869, and all subsequent acts supplementary thereto, was questioned. The constitutionality of all this legislation was sustained in *Thoms v. Greenwood*, 7 Am. L. Rec. 320½ (affirmed by Supreme Court 10 B. 1057). See reference to this affirmation in dissenting opinion of Judge Okey in *State v. Pugh*, 43 O. S. at page 139.

8. Act authorizing trustees to borrow \$300,000 more, and to acquire land for terminal facilities without submission to a popular vote. 77 O. L. 153.



9. Act requiring the Southern Railway trustees to give new bonds and providing for the renewal of bonds. 77 O. L. 175.

10. Act authorizing trustees to lease or sell the Southern Railroad, 78 O. L. 58.

Repealed April 23, 1898 (93 O. L. 637).

Under this act a lease was made of the railway for twenty-five years to The Cincinnati, New Orleans & Texas Pacific Railway Company, October 11, 1881.

Held that the powers of the trustees did not cease with the making of a lease. *Cincinnati v. Bishop et al.*, 6 C. C. 247 (affirmed 52 O. S. 637).

11. Act providing for compensation of trustees. 80 O. L. 168.

12. Act giving power to fill and improve lands for terminal facilities. 82 O. L. 143.

13. Act amending section 3 of the act of February 24, 1876 (73 O. L. 13) as to actions against the trustees. 83 O. L. 38.

14. Act authorizing the city of Cincinnati to adjust claims growing out of construction of Southern Railway. 83 O. L. 152.

15. Act authorizing sale of The Southern Railway upon resolution of council and vote of the people. 84 O. L. 82.

In a suit brought to enjoin the proposed sale, the petition was dismissed on demurrer, and the judgment affirmed by the Supreme Court. *Cincinnati v. Dexter*, 55 O. S. 93.

The vote on the question was against said proposed sale.

This act was repealed April 23, 1898 (93 O. L. 637).

16. Act authorizing the railway trustees to extend lease of Southern Road and authorizing Sinking Fund Trustees to extend outstanding bonds. 86 O. L. 67.

No action was taken under this law, and it was repealed April 25, 1898 (93 O. L. 672).

17. Act authorizing modification and extension of Southern Railway lease conditioned on a vote of the people; also authorizing trustees to borrow \$2,500,000 for terminal facilities. 93 O. L. 637.

Held constitutional and the action of the boards thereunder found to be in all respects regular and legal. *Cincinnati v. Ferguson et al.*, 12 Dec. 439; affirmed by Supreme Court 47 B. 220, 66 O. S. 658.

Held that bonds for terminal facilities and permanent betterments provided for in section 2 of this act could be issued only after execution of the supplemental agreement provided for in section 3 and a favorable vote of the people required in section 4. *Cincinnati v. Ferguson et al.*, 8 N. P. 361; affirmed by Supreme Court without report, 45 B. 443.

Held action of board in relocating terminals and modifying plan as to amount of property, regular and valid. *Cincinnati v. Trustees*, 1 N. P. (N. S.) 361; 14 Dec. 466, (aff'd Supreme Ct., 49 B. 220).

18. Act providing that net earnings of the road shall be paid into the city treasury, and in case of sale, purchase money shall be paid into city treasury to the credit of the Sinking Fund and applied to the reduction of the bonded debt, etc. 93 O. L. 647.

19. Act authorizing Southern Railway trustees to extend outstanding bonds. 93 O. L. 672.

In *Cincinnati v. Guckenberger*, 60 O. S. 353, it was held that the Sinking Fund Trustees had not power without advertising and public bidding, to make a contract with Roberts & Company providing for the sale of city bonds to raise money with which to refund the bonded Southern Railway debt; and whether the above act of April 25, 1898, gave the power to extend the time of payment of Southern Railway bonds solely to the Southern Railway trustees or the Sinking Fund Trustees to be exercised by either, was not decided. For other decisions affecting Cincinnati Southern Railroad, see *Felton v. City*, 95 Fed., 336; *Roberts and Co. v. Taft*, 109 Fed. 825; *Thomas v. C., N. O. & T. P. Ry. Co.*, U. S. Cir. Ct., S. D. Ohio, W. D., No. 4598.

#### OTHER ACTS AUTHORIZING MUNICIPALITIES TO CONSTRUCT RAILWAYS.

For other acts authorizing railroads to be constructed by municipalities, see, as to Toledo, 66 O. L. 83; 75 O. L. 113; Zanesville, 66 O. L. 11; Mt. Gilead, 75 O. L. 110; 77 O. L. 91; 78 O. L. 45; 93 O. L. 679; Hillsboro, 76 O. L. 65; 79 O. L. 82; Georgetown, 76 O. L. 138; 88 O. L. 141; Ripley, 76 O. L. 149; St. Clairsville, 76 O. L. 180; Norwalk, 89 O. L. 323; Pomeroy, 87 O. L. 110; 89 O. L. 308; 90 O. L. 356; 94 O. L. 648; Salem, 88 O. L. 593 (held unconstitutional in *Ry. Co. v. Martin*, 53 O. S. 386).

## X

STREET RAILWAYS IN MUNICIPAL LIMITS.<sup>1</sup>

**Sec. 2503 R. S.** [Grade of streets when street railroad is constructed.] Before any street railroad shall be constructed, on any street less than sixty feet in width, with a roadway of thirty-five feet, or under, the council shall provide, that the crown of the street shall be made a nearly flat uniform curve, from curb to curb, without ditch gutters, and in such manner as to give all wheeled vehicles the full use of the roadway up to the face of the curb, after the plan of the streets in the cities of Philadelphia and New York. And on any street, whenever the tracks of two street railroads, or of a street railroad and a steam railroad, cross each other at a convenient grade, the crossings shall be made with crossing-frogs of the most approved pattern and materials and kept up and in repair at the joint expense of the companies owning said tracks.<sup>2</sup> [1881, April 20; 78 v. 296; Rev. Stat. 1880; 66 v. 217, § 413; (S. & S. 139).]

(1) **Sections on street railways in municipalities.**—§§ 2503 to 2505e R. S. carried here formed part of subdivision 2, Chap. 5, Div. 8, Title XII., R. S. § 2501 will be found under § 29 of the Code, page 146. § 2502 R. S. repealed, is superseded by § 30 of the Code (see § 30, page 149).

Section 3437 R. S., relating to construction of street railways generally, is referred to in § 29 of the Code, and will be found on page 142. § 3438 R. S., repealed, is superseded by § 29 of the Code (see § 29, page 144).

For forms relating to street railway grants see notes pages 142 to 156 inclusive. Municipal power to

regulate speed of street cars, see paragraph 9, § 7 of the Code. Municipal power to require conductors on street cars, see paragraph 28, § 7 of the Code.

(2) **Validity.**—This section is valid and applies whether lines were constructed before or after the passage of the act. Cin. St. Ry. Co. v. C. H. & D. R. R., 32 B. 4.

**Frogs at crossings.**—One compliance with this section is not enough, if a new frog, found to be better, is required. Cin. St. Ry. Co. v. C. H. & D. R. R., 32 B. 4.

Street railroads crossing steam railroads need not provide interlocking devices as required by § 247f R. S. The requirements in



case of crossing of street railway and steam railroad are only those in § 2503 R. S. and §§ (3443—5) and (3443—7) R. S. C. & H. St. Ry. v. C. H. & I. R. R. Co., 21 C. C. 391. See §§ (3443—5) and (3443—7) R. S. *infra*.

**Sec. 2504 R. S. [Pavement of streets where railroads are constructed, proviso.]** The council may require any part or all of the track, between the rails of any street railroad constructed within the corporate limits, to be paved with stone, gravel, boulders, or the Nicholson or other wooden or asphaltic pavement, as may be deemed proper, but without the corporate limits, paving between the rails with stone, boulders, or the Nicholson or other wooden or asphaltic pavement shall not be required; provided, that in cities of the second grade of the first class, the council may require of any street railroad company to pave and keep in constant repair, sixteen feet for a double track or seven feet for a single track, all of which pavement shall be of the same material as the balance of the street is paved with.<sup>1</sup> [87 v. 246; 66 v. 217, § 414; (S. & S. 139).]

(1) **Recovery on default of pavement.**—Where city ordinance requires it, a city may, on default of company, improve the street between tracks and recover the cost in an action against the company. Columbus v. Railroad, 45 O. S. 98.

rails at request of the company, may levy a tax on railroad to collect for its share of the work. Cleveland v. Cleveland & Newburgh R. R., 1 Clev. 304.

**Validity of requirement.**—See Cleveland v. Cleveland R. R. Co., 1 N. P. 413, reversed; 60 O. S. 586.

**Sec. 2505 R. S. [Council of city or village may grant extension of street railroad.]** The council of any city or village may grant permission, by ordinance, to any corporation, individual, or company owning, or having the right to construct, any street railroad, to extend their track, subject to the provisions of sections *three thousand four hundred and thirty-seven, three thousand four hundred and thirty-eight, three thousand four hundred and thirty-nine, three thousand four hundred and forty, three thousand four hundred and forty-one, three thousand four hundred and forty-two, and three thousand four hundred and forty-three*,<sup>1</sup> on any street or streets where council may deem such extension beneficial to the public; and when any such extension is made, the charge for carrying passengers on any street railroad so extended, and its connections made with any other road or roads, by consolidation under ex-

isting laws, shall not be increased by reason of such extension or consolidation.<sup>2</sup> [1880, March 9: 77 v. 42, 43; Rev. Stat. 1880; 66 v. 140.]

(1) Of the sections referred to here, § 3437 is mentioned in § 29 of the Code; § 3438 is repealed by the Code and superseded by § 29 of the Code. The others will be found *infra*.

(2) **Extension.** — For matters relating to grants of extensions to street railways, see notes under § 29 of the Code, p. 145.

**Sec. 2505a R. S.** [Power to lease or purchase, to enter into beneficial arrangement, to purchase stock, etc.; perfection of lease or purchase; rights of dissenting stockholder; increase of fare prohibited.] Any corporation or company organized for street railway purposes, may lease or purchase any street railroad, or street railroads, or railroad operated as a street railroad and by electric power or inclined plane railroad or railroads, together with all the property, real, personal or mixed, and all the franchises, rights and privileges respecting the use and operation of such railroad or railroads, situate or existing in whole or in part within this state, constructed and held by any other corporation or company, corporations or companies, the latter being hereby invested with corresponding power to let or sell upon such terms and conditions as may be agreed upon between the corporations or companies; and any two or more of such corporations or companies may enter into any agreement for their common benefit consistent with and calculated to promote the objects for which they were created. No such lease or purchase shall be perfected until a meeting of the stockholders of each of the companies has been called for that purpose by the directors thereof, on thirty days' notice to each stockholder, at such place, and in such manner, as is provided for annual meetings of the companies, and the holders of at least two-thirds of the stock of each company, in person or by proxy, at such meeting, or at any properly adjourned meeting, assent thereto. Provided that any stockholder who refuses to assent to such lease or sale and signifies the same by notice in writing to the lessee or purchaser within ninety days thereafter, shall be entitled to demand and receive compensation in the manner provided for the compensation of stockholders in sections 3302, 3303 and 3304 of the Revised Statutes, and the said sections are adopted and made to be a part of this section. Provided, that whenever any such lease or purchase is made as herein provided, there shall be no increase of the existing rates of fare by reason of such lease or purchase nor shall any fare be

charged upon any of the separate routes so leased or purchased in excess of the fare charged over such separate routes prior to the lease or purchase thereof, and provided that when any such lease or purchase is made as herein provided, the fare charged for one continuous route or ride in the same general direction over all such leased or purchased lines within any municipal corporation shall not exceed the maximum fare charged over any one of said lines prior to such lease or purchase.<sup>1</sup> [93 v. 214; 92 v. 277; 88 v. 493.]

(1) **Remedy for violation of** v. Ry. Co., 23 C. C. 603; 3 C. C. this section by charging unauthorized fares is by *quo warranto*. State (N. S.) 285.

**Sec. 2505b R. S.** [Consolidation of street railway companies, proviso.]<sup>1</sup> Whenever the lines or authorized lines of road of any street railroad corporation or companies meet or intersect, or can be conveniently operated from one power house or from a power house or power houses owned, under lease or operated by one of such street railroad corporations or companies, or whenever any such line of any street railroad corporation or company, and that of any inclined plane railway or railroad company or corporation, or any railroad operated by electricity may be conveniently connected, to be operated to mutual advantage, or whenever any such line of any street railroad corporation or company and that of any inclined plane railway or railroad company or corporation or the railway of any company operated by electricity can be conveniently operated from one power house or from a power house owned, under lease or operated by one of such street railroad corporations or companies or inclined plane railway or railroad companies or corporations or by any company or corporation, the railway of which is operated by electricity such corporations or companies, or any two or more of them, are hereby authorized to consolidate themselves into a single corporation, provided they are not competing lines, but the provisions herein as to competing lines shall have no application to such companies or corporations whose lines are nearby or wholly situate in any city of the state of Ohio or whenever a line of road of any street railroad company or corporation organized in this state is made, or is in process of construction to the boundary line of the state, or to any point either within or without the state, such corporation or company may consolidate its capital stock with the capital stock of any corporation or company, or corporations and companies in an adjoining state, the line or lines of whose road or roads have been made or are in process of construction to the same point or points, in the same manner and



with the same effect as provided for the consolidation of railroad companies in sections 3381, 3382, 3383, 3384, 3385, 3386, 3387, 3388, 3389, 3390, 3391, and 3392 of the Revised Statutes, and any and all acts amendatory and supplementary to said sections and each of them; and the said sections, including these so amended and supplemented are adopted and made a part of this section.<sup>2</sup> [May 10, 1902, 95 v. 510; 92 v. 277; 89 v. 406; 88 v. 493.]

(1) This section is given as amended May 10, 1902.

(2) **Relation of consolidated to constituent companies.**—A consolidated corporation holds property in its own right, and not in trust for the constituent companies. *Greene v. Woodland Ave., etc., St. R. R. Co. et al.*, 62 O. S. 67.

But a consolidated company holds its stock in trust for members of the constituent companies. *Fuller v. Railway*, 8 N. P. 605.

Rights of pledgee of stock of old company, see *Cleveland City Ry. Co. v. First Nat. Bk.*, 68 O. S. 582.

**Terms of consolidation** which may be prescribed, see *Ib.*

**Liability for tort.**—Consolidated

company is liable for torts of original companies, and after a verdict against one of the constituent companies, pleadings may be amended to aver the consolidation. *Cin. St. Ry. Co. v. Fullbright*, 7 B. 187.

**Delivery of new stock** should be to stockholders and not to officers of original companies. *Robinson v. Cleveland St. Ry. Co.*, 5 N. P. 293, 301.

**Status of constituent companies.**—On consolidation the old companies became extinct except for certain limited purposes. *Cleveland City Ry. Co. v. First Nat. Bank*, 22 C. C. 165 (rev. other grounds, 68 O. S. 582).

[Sec. 2505b—1.] [Consolidation of electric railroad or street railroad companies.] (§ 2.) When the lines of a road of any street railroad company or railroad company, organized under the laws of this state, are constructed or in process of construction, and are or will be operated by electricity, and connect, or will or can be made to connect with the lines of another street railroad company or railroad company, formed by the consolidation of companies organized under the laws of this state, or by the consolidation of a company organized under the laws of this state and a company organized under the laws of an adjoining state, whose lines of road are constructed or in process of construction, and are or will be operated by electricity, so that cars may pass over such lines of roads continuously, without break or interruption, such street railroad or railroad company and such consolidated street railroad company or

railroad company, may consolidate themselves into a single company in the same manner and with like effect as is provided for the consolidation of railroad companies in sections 3380a, 3381, 3382, 3383, 3384, 3385, 3386, 3387, 3388, 3390, 3391 and 3392 of the Revised Statutes of Ohio, and any and all acts amendatory and supplementary to said sections and each of them, all of which are adopted and made a part of this act; provided, however, that companies owning and operating competing lines of road shall not consolidate under this act, but the provisions herein as to companies owning competing lines of road, shall not apply to companies whose lines of road are nearly or wholly situate in any municipal corporation of this state. [97 v. 570.]

**Sec. 2505c R. S.** [Use of street railway tracks for operation of passenger cars of other railway company, etc.] Whenever any railway company is incorporated and organized under the laws of this state for the purpose of building, acquiring, owning, leasing, operating and maintaining a railroad or railroads to be operated by electricity or other motive power from one municipal corporation or point in this state, to any other municipal corporation, municipal corporations, or point in this state, it shall have an authority to make an arrangement or agreement with any street railway company or companies owning or operating any street railway or railways in any such municipal corporation or corporations, and said street railway company or companies shall have authority to make and enter into such arrangement or agreement with said railway company, whereby the passenger cars of such railway company may be run and propelled over and along the track or tracks of such street railway company or companies, for such compensation and upon such terms as may be agreed upon in the same manner, upon the same conditions and for the same length of time as the cars owned or operated by said street railway company or companies are operated in such municipal corporation or corporations. The said cars of said railway company shall, while they are running and being operated over and along the track or tracks of such street railway company or companies in any such municipal corporation, be entitled to all the privileges and subject to all the obligations enjoyed and imposed by and upon the cars of such street railway company or companies owning or operating its cars in any such municipal corporation, and shall be operated only by the same motive

power with which the cars of such street railway company or companies are or may be operated. Such arrangement and agreement, when authorized by not less than two-thirds in amount of the stockholders of each company proposing to enter into such arrangement and agreement, ratified by a majority of the directors and executed by the proper officers thereof, shall give to such railway company full authority to operate its said cars on the tracks of said street railway company or companies in such municipal corporation or municipal corporations. Provided that it shall not be necessary for such railway company, in case it uses in any such municipal corporation or municipal corporations, only the tracks of a street railway company or companies owning or operating a street railway or railways within such municipal corporation or municipal corporations to obtain any additional grant, franchise or right, except by said arrangement or agreement with said street railway company or companies. Provided further, that the fare charged by said railway company for transporting passengers within the municipal corporation or municipal corporations, shall not be greater than that fixed in the franchise or franchises held or owned by such street railway company or companies; and where there is a public park or cemetery on the line of such railway and within one mile of, and owned by, such municipal corporation, such company shall for such fare so transport passengers to and from said park or cemetery the same as though either was within the limits of such corporation.<sup>1</sup> [91 v. 379.]

**(1) Agreement with third company.**— When one company has by proper proceedings obtained right of way over tracks of another company, it cannot recover compensation from a third company granted a right of way from first company. Toledo Elec. St. Ry. Co. v. T. & M. V. Ry., 10 C. C. 168.

**Abutting owner cannot com-**

**plain** when one company, with tracks already laid, grants to a second company the use of its tracks. Sanfleet v. Toledo *et al.*, 10 C. C. 460.

**Construction.**— §§ 2505 and 2505c were held not to conflict. State v. Dayton Traction Co. *et al.*, 18 C. C. 490, 497.

**Sec. 2505e R. S.** [Street or electric railway may lease or purchase property, etc., of electric or gas light, heat, power or fuel company; stockholders' meeting to perfect lease or purchase; dissenting stockholders; lease or sale shall not affect liability of company selling.] <sup>1</sup> Any corporation or company maintaining and



operating a street railroad, or a railroad operated by electricity, may lease or purchase all the property, real, personal and mixed, and all the franchises, rights and privileges of any company organized for the purpose of supplying electricity, or natural or artificial gas, or both electricity and natural or artificial gas, for power, light, heat or fuel purposes, or which has been engaged in such business in whole or in part in any municipality within this state, the latter being hereby vested with corresponding power to let or sell, upon such terms and conditions as may be agreed upon between the corporation and company. No such lease or purchase shall be perfected until a meeting of the stockholders of each of the companies has been called for that purpose by the directors thereof, on thirty (30) days' notice to each stockholder at such time and place and in such manner as is provided for the annual meetings of the companies and the holders of at least two-thirds of the stock of each company in person or by proxy, at such meeting, or at any properly adjourned meeting assent thereto. Provided, that any stockholder who refuses to assent to such lease or sale and so signifies by notice in writing to the lessee or purchaser within ninety (90) days thereafter shall be entitled to demand and receive compensation in the manner provided for the compensation of stockholders in sections 3302, 3303 and 3304 of the Revised Statutes and the said sections are adopted and made a part of this section. Any such company so leasing or purchasing the property, rights and franchises of an electric light and power company, or natural or artificial gas company, or electric light and power and natural or artificial gas company, shall have all the rights, power and authority of the company where property rights and franchises are so leased or purchased, but the liability of an electric light and power company, or natural or artificial gas company, or electric light and power and natural or artificial gas company, shall in no manner be affected by its lease or sale as herein provided. [1902, May 6, 95 v. 390; 93 v. 139.]

(1) This section is given as It was held constitutional in Cin.  
 amended May 6, 1902. St. Railway Co. v. Horstman, 72  
 § 2505d was repealed 93 O. L. 3. O. S. 93.

**Sec. 3439 R. S. [Written consent of owners of more than one-half of feet front necessary.]**<sup>1</sup> No such grant<sup>2</sup> shall be made until there is produced to council, or the commissioners, as the

case may be, the written consent of the owners of more than one-half of the feet front of the lots and lands abutting on the street or public way, along which it is proposed to construct such railway or extension thereof;<sup>3</sup> and the provisions of sections *two thousand five hundred and one* and of *two thousand five hundred and three* to *two thousand five hundred and five*, inclusive,<sup>4</sup> so far as they are applicable, shall be observed in all respects, whether the railway proposed is an extension of an old or the granting of a new route;<sup>5</sup> provided, that this act shall not apply to any county containing a city of the second grade of the second class.<sup>6</sup> [1883, April 18, 80 v. 173, 175; Rev. Stat. 1880; 65 v. 112, § 3; (S. & S. 139.)]

(1) See note (1) under § 2503 R. S., *supra*.

(2) **Grant referred to** is grant of right to construct or extend street railway, as formerly provided in § 3438 R. S., now superseded by § 29 of the Code, which see, page 144.

(3) **Consents.**—See note (4) under § 30 of the Code (page 151).

(4) **Sections referred to.**—For § 2501, see page 146. §§ 2503 to 2505 are carried, *supra*.

(5) **Extensions.**—In case of extensions only § 2505 R. S. is applica-

ble. No notice, as required by § 2502 R. S. (Code § 30) is necessary. C. C. C. & St. L. Ry. Co. v. U. B. & N. Ry. Co., 26 C. C. 180.

(6) **Constitutionality.**—This last proviso excepting Montgomery County is invalid, being a special act, and makes the whole section as amended with this proviso invalid and leaves the preceding law, which was the section as contained in R. S. of 1880, in force. C. C. C. & St. L. Ry. Co. v. U. B. & N. Ry. Co., 26 C. C. (aff'd 73 O. S. 364).

**Sec. 3439a.** [Time after which abutting property owner can not withdraw consent for construction.] Nothing contained in sections 2502 and 3439 shall permit any persons owning property abutting on any street along, in or over which a street railroad is about to be constructed, to withdraw his or their consent after an ordinance granting the right to construct and operate a street railroad shall have been read the second time; provided, a period of at least thirty days has elapsed since the first reading of said ordinance in the council or other body authorized to make the grant. And where an abutting property holder has been heretofore compensated for his consent, or has heretofore withdrawn his consent, notwithstanding thirty days has not elapsed since the first reading of the ordinance after an ordinance granting the right to construct and operate a street railroad has been read the second time in the

council or other body authorized to make the grant and a grant has been made by the council or other public body to a company or individual, pursuant to such consents, the grant shall not be held invalid by reason thereof.<sup>1</sup> [1902, May 10, 95 v. 475.]

(1) **Validity.**—Section held constitutional in *Hume v. Traction Co.*, 13 Dec. 70.

**Sec. 3440 R. S.** [When property may be appropriated for such railways; Toledo; Cuyahoga county.] When the council or commissioners make such grant, the company or person to whom the grant is made may appropriate any property necessary therefor when the owner fails to expressly waive his claim to damages by reason of the construction and operation of the railway; and in any city of the third grade of the first class any person, persons or company which is authorized to construct and operate and has constructed and is operating a street railway, may appropriate any property necessary for the purpose of occupying and using under section 3438<sup>1</sup> any existing street railway track or tracks, subject to the limitations of said section, and for not more than one-eighth of the entire distance between the termini of the route as actually constructed, operated and run over, of the appropriating company or person at the time appropriation proceedings are begun, such appropriation to be made in the mode and manner provided for the appropriation of property in part third, title 2, chapter 8, of the Revised Statutes; and in counties containing a city of the second grade of the first class the power to appropriate may be exercised, as hereinbefore provided, for the purpose of constructing a street railway along a highway occupied by a turnpike or plank road company when the person, persons or company authorized to construct such street railway can not agree with such turnpike or plank road company upon the terms and conditions upon which such highway may be occupied, and when such appropriation will not unnecessarily interfere with the reasonable use of such highway by such turnpike or plank road company; provided, nothing herein contained shall affect the rights of property owners to give or withhold their consent concerning the right of way for street railroads upon any street or road.<sup>2</sup> [89 v. 349; 87 v. 178; 63 v. 55, § 4; 61 v. 53, § 1; S. & S. 136; S. & S. 137.]

(1) § 3438 is now superseded by § 29, which see, page 144.

(2) **Validity.**—This section was held constitutional in *Toledo*, etc.,



Ry. v. Toledo, etc., Ry., 6 C. C. 362. See also, same case affirmed, 50 O. S. 603.

**Appropriation of other tracks.**

—The right to appropriate the right to use the track of another company, does not exhaust the franchise of such other company. Toledo, etc., Ry. v. Toledo, etc., Ry., 6 C. C. 362. The right of eminent domain not affected by motive power. *State ex rel. v. Taylor*, 55 O. S. 61, 66.

The right to appropriate the use of track of another company, is not interfered with by the sections giving companies power to make traf-

fic arrangements for joint use of tracks. *State v. Elec. St. Ry.*, 19 C. C. 79, 90. A second company may appropriate the right to "straddle" the tracks of the first company. *H. G. & C. Traction Co. v. C. D. & T. Traction Co.*, 47 B. 854.

**Use by third company.**—Where a company has appropriated the right to use the tracks of another company, it cannot claim compensation from a third company which is given the use of the tracks by the original company. *Toledo, etc., Ry. Co. v. Toledo and Maumee Valley Ry. Co.*, 10 C. C. 168.

**Sec. 3441 R. S.** [The authority controlling the public road must consent.] If the public road along which the railway is to be constructed is owned by a person or company, or is within the control or management of the board of public works or other public officer,<sup>1</sup> such person, company, or officer may agree with the person or company constructing the railway as to the terms and conditions upon which the road may be occupied.<sup>2</sup> [67 v. 10, § 1.]

(1) **County commissioners included.**—See *R. R. Co. v. Comm'rs*, 56 O. S. 1, 7.

(2) **Scope of power.**—The power to agree with authorities in

control of road does not give the right to take the road, if no agreement is reached. The alternative is appropriation under § 3440 R. S. *Ib.*

**Sec. 3442 R. S.** [Form of oath in appropriation proceedings.] In case of appropriation of property for such purpose, the oath to be administered to the jury shall be as follows: "You and each of you do solemnly swear that you will justly and impartially assess, according to your best judgment, the amount of compensation which is due to [here name the owner or owners], by reason of the appropriation of the street or avenue [as in the statement described], irrespective of any benefit from any improvement proposed by said [here name the company, individual, or company of individuals], and that you will in assessing any damages that may accrue to [here name the owner or owners], by reason of the appropriation, other than the compensation, further ascertain how much less valuable the lot or lots of said [here name the owner or owners], will be in consequence of such appropriation." And the jury, in ascer-

taining such compensation or damages, shall determine the amount thereof without reference to the distinction between a public and a private nuisance, and the effect of such distinction upon the right of such owner or owners to claim compensation or damages, and the court shall, if requested, so direct the jury. [63 v. 55, § 5; S. & S. 138.]

**Sec. 3443 R. S. [Council, etc., may fix terms and conditions.]** Council, or the commissioners, as the case may be, shall have the power to fix the terms and conditions upon which such railways may be constructed, operated, extended, and consolidated.<sup>1</sup> [67 v. 10, § 1; 66 v. 140, § 1.]

(1) **Power of council.**—As to conditions implies the right to power of council to fix terms upon agree upon the duration of the occupancy of the streets and limit use portion of tracks of another the period of the grant. Louisville railway company, see Railroad Co. Trust Co. v. Cincinnati, 10 O. F. v. Railroad Co., 36 O. S. 239. D. 112.

The right to impose terms and

**Sec. 3443a R. S. [Watchmen at street crossings, intersections and corners.]** Whenever any street railways are operated by electricity, cable, compressed air, or any motive power other than horses or mules, in any municipality, the board of legislation or council of such municipalities shall have the power by ordinance to require the owners or operators of any such street railways to place watchmen at any street crossings, intersections or corners which such board of legislation or council may deem dangerous; and to provide for the proper enforcement of such ordinances by penalties in the way of fine or imprisonment, or both, which may be imposed upon the owner, officer, or operator of such street railways or by a penalty of not exceeding \$100 per day, which may be recovered by such municipalities in a civil suit against the owners or operators of any such street railway failing to place such watchmen as may be required. [89 v. 346.]

**Sec. 3443—1 R. S. [Street railroad route in Cincinnati made valid.]** § 1. That in all cases where in cities of the first grade of the first class the council has heretofore, by ordinance, established any street railroad route and declared the conditions upon which a street railroad should be constructed and operated upon and along such route, and due publication of a notice has been made calling for proposals to construct and operate such street railroad to be awarded to the corporation, individual or individuals that should agree to carry passengers thereon at the lowest rates of fare, and the proposal of a bidder who obtained and filed the written consents of the owners of the majority of the feet front of property on each street on the line of

the route has been accepted thereon, and an ordinance passed granting to such bidder the franchise to construct and operate such street railroad, and such bidder has accepted the same and entered into a written contract with such municipal corporation to construct and operate such street railroad, such ordinance, grant, contract and franchise shall be deemed and held, in all respects, to be valid and binding, notwithstanding the submission of another bid at such letting by a bidder proposing to carry passengers on such route as a lower rate of fare, who failed and neglected to obtain and file the written consent of any of the property owners on the line of said route.<sup>1</sup> [88 v. 303.]

(1) **Construction of section.**—Knorr v. Miller, 5 C. C. 609.

**Sec. 3443—2 R. S.** [Authorizing municipal authorities to grant permission to extend tracks, etc.; fare must not be increased.] § 2. In cities of the first grade of the first class the board of city affairs or board of public improvements, or their successors in office, may, by resolution, grant permission to any corporation, individual or company owning or having the right to construct any street railroad, to extend their tracks and route subject to such provisions of sections 3437, 3438, 3439, 3440, 3441, 3442 and 3443 of the Revised Statutes<sup>1</sup> as are applicable and not in conflict herewith, on any street or streets when such board may deem such extension beneficial to the public; and when any such extension is made, the charge for carrying passengers on any street railroad so extended, and its connections made with any other road or roads by consolidation under existing laws, shall not be increased by reason of such extension or consolidation. [88 v. 303.]

(1) **Sections referred to.**—See note (1) under § 2503 R. S. *supra*.

**Sec. 3443—3 R. S.** [Forward vestibule of car must be screened and heated.] § 1. Every electric street car other than trail cars, which are attached to motor cars, shall be provided, during the months of November, December, January, February and March of each year at the forward end with a screen constructed of glass or other material, which shall fully and completely protect the driver or motorman or gripman or other person stationed on such forward end, and guiding and directing the motor power by which they are propelled, from wind and storm, and the space provided on such car for such person shall during the said months be provided with a sufficient heating device to maintain a temperature at all times not below 60 degrees Fahrenheit. [1906, Feb. 9, 98 v. 5; 90 v. 220.]



**Sec. 3443—4 R. S. [Penalty; duty of prosecuting attorney.]**

§ 2. Any person, agent or officer of any association or corporation violating the provisions of this act shall, upon conviction, be fined in any sum not less than \$25 nor more than \$100 for each day each car belonging to and used by any such person, association or corporation is directed or permitted to remain unprovided with the screen required in section *one* [§ (3443—3)] of this act; and it is hereby made the duty of the prosecuting attorney of each county in this state to institute the necessary proceedings to enforce the provisions of this act.<sup>1</sup> [90 v. 220.]

(1) **Held constitutional.** — See *State v. Nelson*, 52 O. S. 88.

**Sec. 3443—5 R. S. [Repair of crossings at intersecting street railroads; stopping of cars at crossing.]**

§ 1. Where the tracks of two street railroads cross each other or in any way connect at a common grade, when one or both such street railroads use other than horse power for propelling their street cars, the crossings shall be made and kept in repair at the joint expense of the companies owning the tracks, and all such cars used on said street railroads shall come to a full stop, not nearer than ten feet nor further than fifty feet from the crossing, and shall not cross until the way is clear; and when two or more cars approach the crossing at the same time the car or cars on the road first built shall have precedence.<sup>1</sup> [88 v. 581.]

(1) **Effect.**—Section does not relieve railroad company of operating gates at crossings so as to warn persons in charge of street cars. *Kopp v. B. & O. S. W. Ry. Co.*, 25 C. C. 546.

**Sec. 3443—6 R. S. [Full stop when approaching intersecting steam railway, etc.]**

§ 3. That whenever the tracks of any street railroads in this state cross the tracks of any steam railway at grade, the street railway company operating said line of cars shall cause their street cars to come to a full stop not nearer than ten feet nor further than fifty feet from the crossing, and before proceeding to cross said steam railway tracks, shall cause some person in their employ to go ahead of said car or cars and ascertain if the way is clear and free from danger for the passage of said street cars, and said street railroad cars shall not proceed to cross until signaled so to do by such person so employed as aforesaid, or said way is clear for their passage over said tracks. [88 v. 581.]

**Sec. 3443—7 R. S. [Penalties.]**

§ 3. Every person in charge of any street-car or cars who willfully fails to comply

with the provisions of this act, and fails to bring said car or cars which he has in charge to a full stop, or causes the same before the way is clear, or signaled so to do to cross said steam railroad tracks, shall be personally liable to any person injured by reason of such failure as aforesaid, to a penalty of one hundred dollars, to be recovered by civil action at the suit of the state of Ohio, in the court of common pleas of any county wherein such crossing or connection is, and the company in whose employ such person having charge of said car or cars is, as well as the person himself shall be liable in damages to any person or persons injured in person or property [having charge of such car or cars] as aforesaid.<sup>1</sup> [88 v. 581.]

(1) **Liability of street railroad** under this act see Street Ry. v. Murray, 9 C. C. 291 (aff'd 53 O. S. 570).

**Sec. 3443—11 R. S.** [Leases, purchases and traffic arrangements.] § 4. Such companies<sup>1</sup> shall have power to lease, purchase or make traffic arrangements with any other street railroad company as to so much of its tracks and other property as may be necessary or desirable to enable them to enter or pass through any city or village, upon the same terms and conditions applicable to other street railroads.<sup>2</sup> And any existing street railroad company owning or operating a street railroad shall receive the cars, freight, packages or passengers of any other road, upon the same terms and conditions as they carry for the general public. [91 v. 285.]

(1) **Companies** means companies incorporated for constructing street railroad outside of municipalities.

(2) **Joint use of tracks**, may be secured also under § 3440 R. S. State v. Elec. Ry. Co., 19 C. C. 79. Interurban railway may make traffic arrangements with street railway in municipality, for carriage of merchandise for hire, as well as passengers. State v. Traction companies, 64 O. S. 272.

Interurban railways coming into municipality under this section are subject to the same terms and conditions as the street railway company whose tracks they use, and such interurban companies must give and accept transfers, if the city railway company is required to do so. Cincinnati v. Cincinnati St. Ry. Co., 16 Dec. 220; 3 N. P. (N. S.) 489.

**Sec. 3443—14 R. S.** [Street railroad in Mansfield may operate a light and power plant.] § 1. The council of any city which at the last federal census had or which at any subsequent federal census may have a population of not less than 13,400 nor more than 13,600 may grant permission to any corporation, individual or individuals to construct and operate an electric power and light plant in connection with any street railroad operated

by them, and may prescribe the terms of constructing and operating the same, and such cities may renew any such grants at their expiration upon such conditions as may be considered conducive to the public interests. [ 88 v. 447.]

**An act to provide for appropriation of private property in municipalities by corporations for street railway purposes.**

[Sec. 1.] [Street railway companies may appropriate private property for certain purposes.] That whenever it is deemed necessary by a majority of the directors of any domestic or foreign corporation owning or operating or that may hereafter own or operate a street railway in any municipality in this state to appropriate private property in such municipality in order to avoid dangerous or difficult curves or grades, or unsafe or unsubstantial grounds or foundations or to extend or shorten its railway line, or to provide additional land on which to extend its power plant, then such corporation may appropriate so much of such private property as may be necessary for the said extension of such power plant, or the construction, operation, and maintenance of the tracks, poles, supports, wires, cables and necessary appliances of such railway other than power houses, machine shops, stations or substations in the mode and manner and subject to the provisions provided for the appropriation of property in part third, title 2, chapter 8, of the Revised Statutes of Ohio. Provided, however, that this act shall not be construed to amend or repeal any existing laws relating to the extension of street railway lines within municipalities.

[Sec. 2.] [Such corporation may change location of any portion of such railway.] For the purposes hereinbefore provided such corporation may change the location of any portion of its railway, whether heretofore made or hereafter made; and for the purpose of making any such change, such corporation shall have all the rights, powers and privileges to enter upon private land and make surveys necessary to effect such change as fully as railroad companies are permitted to do under the laws of this state.<sup>1</sup> [1904, April 17, 97 v. 106.]

(1) **Scope of power.**—For construction of similar statute allowing condemnation outside of municipal-

ities, see Columbus, etc., Ry. Co. v. Cole, 47 B. 66.



[An act to grant to municipalities the right to require street railway companies to sprinkle their right of way within such municipality.]

[Sec. 1.] [Council may require street railway company to sprinkle its right of way.] The council of any municipality may by resolution require any interurban or street railway company to sprinkle with water their right of way on any street, alley or public highway, or any portion thereof lying within the limits of such municipality.

[Sec. 2.] [How enforced.] Upon failure of any street railway company, after proper notice, to comply with the provision of such resolution, the municipality may do such sprinkling or contract for the same through its proper officials and in accordance with the laws relating to contracts, and the cost of the same shall be certified to the county auditor for collection, to be paid by such interurban or street railway company as other taxes are paid.

[Sec. 3.] [Repeals.] All acts or parts of acts inconsistent herewith are hereby repealed. [1906, Feb. 8; 98 v. 5.]

#### CHANGE OF ROUTE LAW.

An act authorizing changes in [and] the extensions of existing street railway routes, and in existing transfer systems.

[Sec. 1.] [Municipalities may agree with street railway company for payment of percentage of gross receipts in lieu of car license fees.] That it shall be competent for the board of public service, in any city of the first grade of the first class, and for the council or other legislative body of any other municipal corporation, by and with the consent of the mayor, to agree with any street railway company or companies operating any street railway route or routes in such city or other municipal corporation for the payment of a percentage or additional percentage not less than one per cent. upon its gross receipts in lieu of car license fees that may have been exacted under existing grants, and upon such changes in and extensions of existing street railway route or routes, and any changes in or revision of any prevailing or existing system of transfers between such routes as such board of public service or council, or other legislative body, may deem to be to the benefit, convenience or advantage of the public;

[No increase in rate of fare.] provided, that nothing herein contained shall be construed to authorize any increase in the rate of fare by reason of any such changes, revisions or extensions;

[When not necessary to secure consents to changes or extensions of existing routes.] and provided, further, that when any such changes in or extensions of existing routes are made so as to run in whole or in part over and along existing tracks already belonging to such company or companies, it shall not be necessary to secure and file the consents to such changes or extensions of the owners of the property abutting on the streets on which such existing tracks are located. Provided, further, that nothing herein contained shall be construed to authorize the extension of the track or route of one street railway company over those of any other street railway company, otherwise than in the manner already provided by law, excepting by agreement of both such companies.

[No extension in length of franchise.] Provided, that nothing herein contained shall authorize the extension of existing street railway routes or any portion thereof over and along existing tracks or portions thereof for a longer period than the terms for which the original franchises for such roads or routes existing at the time of the passage of this act, were granted.

[Notice of pendency of ordinance to extend or change route.] Provided, further, that no resolution or ordinance, providing for such extension or change of route or routes, or changes or revision of systems of transfers, shall be passed until public notice of the pendency of such resolution or ordinance shall have been given in one or more of the daily newspapers published in said municipal corporation, if there be such, and, if not, then in one or more newspapers of general circulation in said municipal corporation, for the period of at least three consecutive weeks;

[When consent to change, etc., necessary.] and provided, further, that no change or extension of any existing route shall be granted over any street or streets now unoccupied by street railway tracks, unless the consent of a majority of the owners of property abutting on such street or streets shall have been first obtained as now by law required.

[Sec. 2.] [No subsequent change in five years.] Whenever any street railway route or routes shall have been changed under agreement as provided in the preceding section of this act, no subsequent change of said route or routes shall be made within a period of five years thereafter. [May 10, 1902, 95 v. 502.]

## INCLINED PLANE RAILWAYS.

**Sec. 3444 R. S. [Powers of inclined plane railway companies.]**

An inclined plane railway company may construct, operate, and maintain an inclined plane railway, for the conveyance of passengers and freight, or either, with such offices, depots, and other buildings as it may deem necessary, and may establish and maintain a park or pleasure-grounds, and for such purpose may acquire and hold real estate. [73 v. 229, § 2.]

**Sec. 3445 R. S. [How street crossings to be made.]** When the part of the railway of such company which is operated by steam power crosses a public street or highway, it must pass either over or under such street or highway, and shall be constructed in such manner, and at such distance above or below the same as not to obstruct the ordinary use of such street or highway. [73 v. 229, § 10.]

## INTERURBAN RAILWAY TERMINALS.

**[An act authorizing councils of municipalities to grant franchises to interurban railroads, using electric or any other motive power except steam, for the purpose of securing terminals in municipalities.]**

**Sec. 1. [Council authorized to grant franchises to interurban railroads for the purpose of securing terminals in municipalities.]** That the council of any municipality may grant a franchise upon such terms and conditions as it may prescribe for the building of any interurban railroad having, constructing or building ten miles or more of track outside of such municipality, to any company or companies using electric or other motive power, save steam, for the purpose of securing to such company or companies access to or terminals within said municipality. The council may authorize such company to build and construct tracks and to operate cars thereon, on any street or streets, or parts of streets, of such municipality upon which tracks have not already been laid and where the consent of the owners of a majority front footage has already been obtained by such company.

And council may permit such interurban railroad to make use of the tracks or such parts of the tracks of any existing street railroad company within the limits of the municipality by agreement with the existing company in such municipality, or if no such agreement can be arrived at, such interurban railroad company may be authorized by council to condemn the right to make use of the tracks of such existing company upon the payment of proper compensation, provided that such



interurban railroad company shall be permitted to condemn and make use of not more than one-eighth of the trackage of such company within the municipality, or so much as may be necessary to give such interurban company access to terminals within such municipality or to enable such company to secure a right of way over such tracks through such municipality, provided, however, that any such interurban railway company seeking permission to enter or pass through any municipality shall not be required to submit to competitive bidding on such routes, provided that no grant or franchise shall be made to such interurban company for a period longer than 20 years, and provided further that no franchise granted under the provisions of this act shall be used for the purpose of operating a municipal street car system, it being the only intent of this act to provide a method whereby bona fide interurban railroads may gain access to, and a terminal within, and an exit from, a municipality. [1906, April 16, 98 v. 253.]

## XI

MAGNETIC TELEGRAPH COMPANIES;  
WIRES AND SUBWAYS.

**Sec. 3461 R. S. [How right to use public ground acquired.]** When any lands authorized to be appropriated to the use of a company<sup>1</sup> are subject to the easement of a street, alley, public way, or other public use, within the limits of any city or village, the mode of use shall be such as shall be agreed upon between the municipal authorities of the city or village and the company,<sup>2</sup> and if they can not agree,<sup>3</sup> or the municipal authorities unreasonably delay to enter into any agreement, the probate court<sup>4</sup> of the county in a proceeding instituted for the purpose shall direct in what mode such telegraphic line shall be constructed along such street, alley, or public way, so as not to incommode the public in the use of the same;<sup>5</sup> but nothing in this section shall be so construed as to authorize any municipal corporation to demand or receive any compensation for the use of a street, alley, or public way, beyond what may be necessary to restore the pavement to its former state of usefulness. [62 v. 72, § 5; S. & S. 154.]

(1) **Company referred to** is a magnetic telegraph company, powers of which are defined in Chap. 4, Title II., Part II., of Bates' Revised Statutes. The sections here printed are a part of that chapter.

A foreign telephone company cannot exercise the power of eminent domain in Ohio to condemn a right through the streets. *Central Union Tel. Co. v. Columbus Grove*, 28 C. C. 131; 8 C. C. (N. S.) 81.

(2) **Duration of right.**—Upon expiration of agreement with city the company's right to use the street ceases. *State v. Telephone Co.*, 11 C. C. 55. But company cannot be ousted until a failure to agree as to further use and unreasonable delay in applying to Probate Court. *State ex rel. v. Telephone Co.*, 14 C. C. 273.

**Extent of municipal power.**—The right of the company to use the streets is given directly by the legislature and is independent of the

municipality, except that the municipality may discharge the duty imposed upon it of keeping the streets in repair and free from nuisance and may fix the mode of use by telephone company under provisions of § 3461. The city's power is exhausted when it allows the company to occupy the streets and agrees as to the mode of using the streets. *Macklin v. Telephone Co.*, 24 C. C. 446; 1 C. C. (N. S.) 373 (aff'd 70 O. S. 507); *Fitzsimmons Tel. Co. v. Cincinnati*, 2 N. P. (N. S.) 51; *Farmer v. Telephone Co.*, 72 O. S. 526.

**Municipality cannot fix telephone rates.**—Municipality is without power to fix the rates to be charged or to require free telephones to be furnished the municipality, and the telephone company is not estopped, by agreeing to such terms, from increasing the rates or refusing free telephones. *Farmer v. Telephone Co.*, 72 O. S. 526. See

also *Macklin v. Telephone Co.*, 24 C. C. 446, 453; 1 C. C. (N. S.) 373 (aff'd 70 O. S. 507).

**Revocation of right.**—See *Cincinnati v. Cin. Edison Co.*, 26 B. 104.

(3) **Failure to agree.**—A petition which shows no specific questions of difference between the corporation and the municipal authorities, but alleges in that behalf only that they have failed to agree on the mode of use of the streets, and prays for a general judgment directing in what mode plaintiff may construct its telephone lines along the streets, does not state facts justifying any order or judgment in its favor. *Queen City Telephone Co. v. Cincinnati*, 73 O. S. 64.

Failure to agree as to price to be charged patrons for instruments is not such failure to agree as to mode of use contemplated by this section. *State ex rel. v. Telephone Co.*, 14 C. C. 273. As to what is unreasonable delay to enter into agreement, see *Cincinnati Telephone Co. v. Cincinnati*, 48 B. 986.

(4) **Validity.**—This section is not unconstitutional because it confers on the Probate Court the power to fix terms for use of streets by telegraph companies. *Zanesville v. Telegraph & Telephone Co.*, 64 O. S. 67.

Probate Court has jurisdiction to make order directing mode of use as provided in this section. *Ib.*

**Use by another company.**—See *Hauss Elec. Co. v. Jones Bros. Elec. Co.*, 23 B. 137.

**Franchise by Probate Court,** cannot require telephone company to put its wires and apparatus in conduits under the streets, in the absence of consent by municipal authorities. *Queen City Telephone Co. v. Cincinnati*, 73 O. S. 64; *contra*, *Cincinnati Telephone Co. v. Cincinnati*, 49 B. 83; *Cleveland Telephone Co. v. Chagrin Falls*, 14 Dec. 449; *Telephone Co. v. Middletown*, 2 N. P. (N. S.) 455.

The court has no jurisdiction, as part of its order, to prescribe or determine the rates to be charged by the company, and so much of a court's order as undertakes to do this is void. *State ex rel. v. Toledo Home Telephone Co.*, 72 O. S. 60.

A company is not estopped to question validity of court's order fixing rates because the rates were fixed by court's order upon application of the company. *Ib.*

Company seeking franchise must prove incorporation and due and legal election of directors. *Queen City Telephone Co. v. Cincinnati*, 73 O. S. 64.

### Sec. 3471 R. S. [Chapter applies to telephone companies.]

The provisions of this chapter<sup>1</sup> shall apply also to any company organized to construct any line or lines of telephone; and every such company shall have the same powers and be subject to the same restrictions, as are herein prescribed for magnetic telegraph companies.<sup>2</sup>

(1) See note (1) to § 3461 R. S., *supra*.

(2) The term "telegraph" was held sufficient to embrace telephone

company even without statutory provision. *Railway v. Telegraph Ass'n*, 48 O. S., 390, 423.

### Sec. 3471a R. S. [Electric light companies, and power and automatic package carrier companies; consent of municipality, etc.]

The provisions of this chapter,<sup>1</sup> so far as the same may be applicable, except section three thousand four hundred and sixty-one, shall apply also to any company organized for the purpose of supplying the public and private buildings, manufacturing establishments, streets, alleys, lanes, lands, squares



and public places with electric light and power, or automatic packages carrier; and every such company shall have the same powers, except those given by said section three thousand four hundred and sixty-one, and be subject to the same restrictions, as are herein prescribed for magnetic telegraph companies. Provided, however, that in order to subject the same to municipal control alone, no person or company shall place, string, construct or maintain any line, wire fixture or appliance of any kind for conducting electricity for lighting, heating or power purposes through any street, alley, lane, square, place or land of any city, village or town, without the consent of such municipality; and this inhibition shall extend to all levels above and below the surface of any such public ways, grounds or places, as well as along the surface thereof; but this inhibition shall not be applicable to any rights which have heretofore been received and exercised through proceedings of any probate court. Any person or company violating any portion of the inhibition aforesaid shall be deemed guilty of a misdemeanor, and shall upon conviction thereof be fined in any sum not less than one hundred and not more than five hundred dollars. The means thus created for enforcing said inhibition shall be held to be only cumulative to any other lawful means open to the municipality by way of injunction or otherwise; and this act shall apply to actions and causes of action or proceeding named in section seventy-nine of the Revised Statutes, except such as may be pending on error, and not on appeal, in any circuit court of the state. [92 v. 204; 84 v. 7.]

(1) See note (1) to § 3461 R. S., *supra*.

(2) **Provision prospective.** — Provision of § 3471a prohibiting the placing of wires through a street for conducting electricity has a prospective operation and does not affect wires already properly placed in the street. *Henry v. Cincinnati*, 25 C. C. 178; 1 C. C. (N. S.) 289.

A municipality will be enjoined from removing a wire already placed. *Ib*.

**Scope of prohibition.**—As to whether prohibition extends to case of wires a great distance above or below surface of ground, see *Henry v. Cincinnati*, 1 C. C. (N. S.) 289; 25 C. C. 178; and *Butler v. Cincinnati*, 2 C. C. (N. S.) 376.

The word "through" in the section was held not to apply to wires strung across the street. *Henry v. Cincinnati*, 1 C. C. (N. S.) 289; 25 C. C. 178.

**Sec. 3471—1 R. S.** [Subways for telephone and telegraph wires in cities; erection of poles; penalty.] § 1. Any company organized under the laws of this or of any other state, and owning and operating a telephone exchange, or doing a telegraph business, in any city in this state, may construct and maintain underground wires and pipes, or conduits and other fixtures for containing, protecting and operating such wires in the streets

and public ways of said city, when the consent of such city has been obtained therefor, and it shall be unlawful for any corporation, company or individual to erect any telephone or telegraph-pole or poles within that portion of any city in this state where subways have been constructed, except such poles as may be required for the purpose of distributing wires from said subways to subscribers, stations, and all such poles shall, so far as possible, be located in alleys; provided that this section shall not apply to existing telegraph companies until such companies shall have authority and sufficient time to construct subways; and whoever violates any of the provisions of this section, shall be punished by a fine of not more than two hundred and not less than fifty dollars. [91 v. 205; 88 v. 296.]

**Sec. 3471—2 R. S. [By whom consent given.] § 2.** Such consent shall be given by the board of city commissioners, board of public improvements, board of public works, or board of administration of such city, or their respective successors in office, or by the city council in cities where no such board exists. [88 v. 296.]

**Sec. 3471—3 R. S. [Powers of electric light and power companies.] § 1.** A company organized for the purpose of supplying electricity for power purposes, and for lighting the streets and public and private buildings of a city, village or town, may manufacture, sell and furnish the electric light and power required therein for such and other purposes, and such companies may construct lines for conducting electricity for power and light purposes through the streets, alleys, lanes, lands, squares and public places of such city, village or town, by the erection of the necessary fixtures, including posts, piers and abutments necessary for the wires, with the consent of the municipal authorities of the city, village or town, and under such reasonable regulations as they may prescribe. Provided, that all wires erected and operated under the provisions of this act shall be covered with a water-proof insulation, and said poles, piers, abutments and wires shall be so located and arranged as not to interfere with the successful operation of existing telegraph and telephone wires. [83 v. 143.]

**Sec. 3471—5 R. S.<sup>1</sup> [Validity of prior contracts.] § 3.** That in all cases where contracts such as are provided for in section 2 [§(3471—4)]<sup>2</sup> of this act have been entered into prior to its passage and there may have been any omission or error arising out of a want of conformity to the statutes of this state but which contracts have been made as required by this act and where it is just and equitable by reason of the expenditure of money or labor in the performance of said contracts or on any other account to fully execute said contracts, then and in all

such cases the courts of this state are hereby authorized and empowered to uphold such contracts as valid and binding on all parties to the same and to enforce and carry them into effect in all respects as though no such defect, omission or error existed, any law of this state to the contrary notwithstanding. [92 v. 290.]

(1) § (3471-4) and (3471-4a) omitted here, are repealed by the Code.      tric light companies. It is repealed by the Code. See § 45 of the Code, where power to contract with

(2) § (3471-4) provided for contracts of municipalities with elec-      lighting companies is given.

**Sec. 3471—6 R. S.** [Subways and conduits for electric wires, etc., in Cincinnati.]<sup>1</sup> § 1. Any company organized for the purpose of constructing subways, laying pipes and operating underground conduits in any city of the first grade of the first class, in which to place and maintain electric cables, wires and other conductors for conveying electric currents for any purpose, may construct such subways and under-ground conduits through the streets, avenues, sidewalks, alleys, lanes, lands, squares and public places of such city, and maintain such subways and conduits, together with necessary man-holes, junction-boxes, connection-boxes, feeders, pipes and connections to and from such subways and conduits, and all such other necessary fixtures and appliances for placing and safely carrying electricity or electrical conductors beneath the surface of the streets, avenues, sidewalks, alleys, lanes, lands, squares and public places of any such city. [88 v. 390.]

(1) **Validity.**—§§ 3471-6 and 3471-7 are special acts and unconstitutional. Cincinnati Telephone Co. v. Cincinnati, 49 B. 83.

**Sec. 3471—7 R. S.** [Permission for construction of, etc.: by whom granted, and rules governing construction.] § 2. In cities of the first grade of the first class, the board of public improvements and their successors in office of any such city shall have authority in case such city should not construct its own system of subways (and in the event it does, the board of public improvements or their successors in office shall have power to contract for the construction of the same), to grant to any person, company or corporation organized for the purpose of constructing subways, laying pipes and operating underground conduits in which to place and maintain electric cables, wires and other necessary appliances for conveying electric currents, permission and authority to construct and operate such



subways and under-ground conduits through the streets, avenues, sidewalks, alleys, lands, squares and public places of such city, with the necessary man-holes, junction-boxes, connecting-boxes, feeders, pipes and other connections and appliances; and it shall be unlawful for any such company to enter upon the construction of any such work, or to open or take up the pavements of the streets, or to make any excavations in any of said streets, avenues, sidewalks or other public ways of said city until it has first obtained authority so to do from the board of public improvements or their successors in office in cities of the first grade of the first class; and any such person, company or corporation operating or maintaining the same shall be subject to such reasonable regulations as the board of public improvements or their successors in office in cities of the first grade of the first class shall make concerning the construction and use of said subways and conduits, and the time, manner and mode of placing wires, cables and other electrical conductors therein. And it is hereby made the duty of the board of public improvements or their successors in office to adopt and enforce such rules and regulations so as to secure the construction of said subways and under-ground conduits in the most approved manner, for the safety of persons and property adjacent to and connected with said subways and under-ground conduits[;] such construction shall be under the control and subject to the approval of the chief engineer of the board of public improvements or their successors in office and the fact that such approved and safe construction has actually taken place, shall be certified to in writing by the said engineer before any use shall be made of the same. Provided, however, that no such permission and authority hereinbefore referred [to] shall be granted by said board of city affairs to any such company until said board shall have advertised in some paper of general circulation in such city on at least one day of each week, for four consecutive weeks, for bids for the grant of such permission and authority, and no such grant shall be made except to the highest bidder, nor for a less compensation to the city than the annual sum of one per cent. of the gross proceeds resulting from the operation of said subways, to be paid for such grant and for the purpose of keeping in repair the streets, sidewalks and other places wherein such subways are constructed and operated; and but one such company shall be authorized, in any case to open up the streets for such purpose or to construct, own and operate subways in which to place electric wires, and all such wires except telegraph and telephone wires shall be required to be laid in one general subway constructed for the purpose;

and said board shall have the right to reject any and all bids. Provided, that nothing in this act contained shall be construed [construed] so as to authorize or require the placing of telegraph or telephone wires or conductors in the same conduit or conduits with electric light, power or railway wires, or conductors, or so as to prevent the granting by municipalities of the power to place telephone or telegraph wires or conductors in a separate conduit in the streets to be constructed for that purpose. And provided further, that nothing herein contained shall be so construed as to conflict with any orders made by the probate court of any county, containing a city of the first grade of the first class, for maintaining overhead or underground wires or conduits, for furnishing electric light, heat or power, where investments are made on the faith of the same; but all such orders of the court shall be valid and binding upon all parties thereto and their successors and assigns. [88 v. 390.]

**Sec. 3471—8 R. S. [Bond for restoration of streets, etc.; board of improvements to fix rental.]** § 3. Nothing herein contained, however, shall authorize any person, company or corporation to construct such subways or conduits or to excavate any portion of any street, sidewalk or other public way of any such city, until such person, company or corporation has first executed a bond in the sum of two hundred and fifty thousand dollars, conditioned to restore such streets, sidewalks and other public ways to their original state of usefulness, and to keep the same in repair to the satisfaction of the board of public improvements or their successors in office, and its chief engineer for a period of five years from and after such restoration thereof. The board of public improvements or their successors in office in cities of the first grade of the first class<sup>1</sup> in which such subways may be constructed, shall have power to fix the rental to be charged by persons, companies or corporations owning or operating such subways for the use and occupation of such subways or conduits by electric companies or companies using or supplying electricity for any purpose, and shall estimate the same upon a percentage based on the amount invested in the construction, maintenance and operation of said subways and underground conduits. [88 v. 390.]

(1) **Validity** denied, because special act, see Cincinnati Telephone Co. v. Cincinnati, 49 B. 83.

## XII

### MARKET HOUSES.

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#### 1. MARKET HOUSE COMPANIES.

**Sec. 3858 R. S. [Market-house companies.]** A company incorporated for the purpose of constructing and maintaining a market-house may construct, erect, establish, and maintain, at the place named in its articles of incorporation, a suitable building or buildings to be appropriated and used exclusively as a public market-house, for the sale and vending of meats, vegetables, and all other kinds of provisions, and of fruits, plants, and flowers, and all other articles commonly sold and vended in public market-houses or spaces, on market days, in market hours. [58 v. 92, §§ 1, 2; S. & S. 174.]

**Sec. 3859 R. S. [Powers of such companies.]** Such companies may rent, lease, sell, or dispose of stalls, cellar vaults, or other divisions or spaces in their buildings, in such manner, and upon such terms and conditions, as the directors shall determine; but a uniform rule in renting or leasing such stalls, cellar vaults, or other divisions or spaces, shall be established, printed, and hung in conspicuous places in the buildings, and the same may be changed, from time to time, by the directors thereof; and no preference shall be made, by any variation or difference in rates or prices, in favor of citizens of the city or village wherein the buildings are erected, and against farmers, butchers, or producers not residing in such city or village, and no rule, regulation, order, or condition shall be made or exacted by any company to prevent farmers, butchers, or other persons from disposing of their produce, meats, vegetables, or other articles, in such quantities and upon such terms as they may deem proper; but such companies shall prohibit and prevent in their buildings the use of false weights or measures, the exposure or sale of any diseased or decaying meats or vegetables, and any offensive or injurious articles. [58 v. 92, § 5; S. & S. 175.]



**Sec. 3860 R. S. [May keep streets unobstructed.]** Such companies may keep the streets, alleys, or avenues in front of their buildings free, open, and clear of any and all obstruction from stoppage of wagons, carriages, or vehicles of any kind, or of horses, mules, or cattle, on market days, in market hours. [58 v. 92, § 6; S. & S. 175.]

**Sec. 3861 R. S. [May construct sewers.]** When any such company erects its buildings in a city or village having a sewer with which the company may connect sewers of its own construction sufficient to drain its buildings, it shall construct such sewers, and so connect them; and in cities and villages not having sewers, such companies may construct sewers for the drainage of their buildings, and charge and receive a compensation for the tapping and use of the same, or portions thereof. [58 v. 92, § 7; S. & S. 175.]

## 2. CLEVELAND MARKET HOUSE COMMISSION.<sup>1</sup>

**Sec. 2581—1 R. S. [Market-house commission; number; appointment; term.]** § 1. In cities of the second grade of the first class there shall be a market-house commission consisting of three members, all of whom shall be appointed by the mayor of any such city and approved by the council and who shall serve for the period of five years, and until their successors are appointed and qualified. [93 v. 668.]

(1) The sections carried here are pursuant to the act (93 O. L. 668) in the list of repeals in the Code, from which these sections are taken but by § 216 of the Code, it is shall continue to act till work is provided that all persons appointed completed.

**Sec. 2581—2 R. S. [Oath; compensation; bond.]** § 2. The members so appointed shall take and subscribe an oath of office to honestly and faithfully perform their duties; they shall serve without compensation, and shall give a bond in the sum of five thousand dollars to the approval of the mayor of any such city. [93 v. 668.]

**Sec. 2581—3 R. S. [Power of commission.]** § 3. Such commission shall have power to contract for the building of a new market-house and auditorium for any such city, and to acquire any additional lands that may be necessary for that purpose either by purchase or appropriation in the name of any such city in the manner now provided by law. [93 v. 668.]

**Sec. 2581—4 R. S. [Bonds.]** § 4. The council of any such city may and is authorized and empowered for the purpose of

this act to borrow money and issue the bonds of any such city in the name and under the corporate seal of any such city in a sum not exceeding three hundred and twenty-five thousand dollars, which bonds shall be made payable not more than thirty years, as the city council shall determine, from the date of their issue, and shall bear interest at a rate not exceeding five per cent. per annum, payable semi-annually, as such city council shall determine. [93 v. 668.]

**Sec. 2581—5 R. S. [Signing and attesting of bonds; rent from market-houses to be placed in sinking fund; levy.]** § 5. Such bonds shall be signed by the president of such commission, the mayor of any such city, and attested by the city auditor. All rent obtained by such city from any market-house or houses in such cities, or any addition thereto, shall be placed in the sinking fund of such city until a sufficient amount has been received to fully pay the principal and interest of such bonds; and in case such rents shall not be sufficient to pay the interest and principal of such bonds as the same may become due, any such city council shall, in addition to the other levies authorized by law, levy annually a sufficient tax therefor on the property subject to taxation in any such city, and such taxes shall be collected in the same manner as other taxes. [93 v. 668.]

**Sec. 2581—6 R. S. [Bonds to conform to sections 2700 to 2711 R. S.]** § 6. Such bonds, except as otherwise herein provided, shall in all respects conform to the requirements of sections 2700 to 2711 of the Revised Statutes of Ohio. [93 v. 669.]

**Sec. 2581—7 R. S. [Power of member to create liability.]** § 7. No member of such commission shall have power to create any debt or obligation, claim or liability, for or on account of such commission, except with the express authority of such commission, conferred at a meeting thereof, duly convened and held. [93 v. 669.]

**Sec. 2581—8 R. S. [Record of proceedings.]** § 8. Such commission shall keep a record of all its proceedings under the authority of this act, which shall be open at all reasonable times to the inspection of any resident of such city. [93 v. 669.]

## XIII

CEMETERIES.<sup>1</sup>

**Sec. 2534 R. S.** [How appropriations shall be made.] When an appropriation of land for such purposes<sup>2</sup> becomes necessary, it shall be made by the municipal corporation, or if there be more than one such corporation, then by the one having the largest number of inhabitants at the last federal census, which corporation, in making the appropriation, shall act for itself and any other corporation or township uniting with it, and the proceedings therefor shall be the same as required in this title<sup>3</sup> where the appropriation is to be made for the use of the corporation alone. [66 v. 212, § 378.]

(1) **Sections on cemeteries.**— §§ 2534 to 2558 R. S., and § 2518 R. S., carried here formed part of Chap. 7, Div. 8, Title XII., R. S. Of the sections in this chapter, §§ 2516, 2517, 2521 to 2533, inclusive, and 2533a, are re-enacted in § 8 of the Code. The other sections, not carried here, are repealed by the Code.

(2) **"Such purpose"** refers to union of cities and townships for cemetery purposes. § 2532 R. S. re-enacted in § 8 of the Code, page 72.

(3) **Proceedings for appropriation.**— The method for appropriation here referred to, is that found in Chap. 3, Div. 7, Title XII., R. S. This chapter is now repealed and method of appropriation provided for by §§ 10 to 22 of the Code.

**Public cemetery.**— A cemetery belonging to a private association was held not a public cemetery within the meaning of § 3284 R. S. *Youngstown v. Railroad*, 3 C. C. 214.

**Sec. 2535 R. S.** [Titles, how vested.] The title to such cemetery grounds, whether by purchase or otherwise, shall vest in and be held by the corporation making the appropriation, in trust for the use of its inhabitants and the inhabitants of the other corporations or townships in common; and provision shall be made for the interment in such cemetery of all persons buried at the expense of the corporations or townships. [66 v. 212, § 379.]

**Sec. 2536 R. S.** [Expenses, etc., to be pro rata.] The expense of such purchase, or of the proceedings in case of appropriation,



and the damages awarded, or both, shall be borne by the corporations and townships in proportion to the property of each on the duplicate for taxation, and the amount of bonds issued by each in any case, for such cemetery purposes, shall be in the same proportion, and the percentage of taxation for all such cemetery purposes shall be the same in the corporations and townships. [66 v. 212, § 380.]

**Sec. 2537 R. S. [Control and management.]** The cemetery so owned in common, shall be under the control and management of the trustees, and their authority over the same and their duties in relation thereto, shall be the same as where the cemetery is the exclusive property of a single corporation.<sup>1</sup> [66 v. 212, § 381.]

(1) **Managing board.**—See note under § 2521 R. S., re-enacted in § 8 of the Code (page 68).

**Sec. 2538 R. S. [Power to enforce ordinances, etc.]** The council of any city or village owning a cemetery in common with any other city, village, or township as aforesaid, shall have full power and authority to pass and enforce all ordinances necessary to carry into effect the provisions herein contained, and such as may be deemed necessary for the preservation and regulation of such cemetery and the protection thereof, and for the punishment of any person violating the ordinances, rules, and regulations, relating to such cemetery; and the mayor and police officers of such corporation shall have full and complete jurisdiction and authority to enforce all such ordinances, rules, and regulations, as if such cemetery grounds were located within or owned exclusively by the corporation. [66 v. 212, § 382.]

**Sec. 2539 R. S. [Discrimination forbidden.]** No distinction or discrimination of any kind shall be made by the trustees of such cemetery owned in common, in favor of one corporation against another, or in favor of a corporation against a township, or in favor of a township against a corporation, but the affairs of the cemetery shall in all respects be managed as though the same were owned and governed in the interests of the corporation or township alone. [66 v. 213, § 383.]

**Sec. 2540 R. S. [Joint meeting of council and trustees.]** In case of a union for cemetery purposes between a municipal corporation and a township, the council of the corporation and the trustees of the township shall have a joint meeting at the council-chamber of the corporation, on the day of the first regular

meeting of the council in the month of May of each year, for the purpose of determining the rate [of tax] to be levied upon the taxable property of the corporation and the township for the purposes herein required; and upon the passage of a joint resolution by a majority of the members of the council and the trustees, fixing the rate of taxation, it shall be the duty of the clerk of the corporation to certify such rate to the auditor of the county for assessment and collection; and in case there is more than one municipal corporation or township united for such purposes, the councils and trustees of the townships shall become such joint body with the same powers as if there had been one such corporation and township, and the clerk of the corporation containing the greatest number of inhabitants shall certify to the auditor as above provided, the rate of taxation. [66 v. 213, § 384.]

**Sec. 2541 R. S. [Joint meetings to make rules, etc.]** The trustees of such township or townships, or the council or councils of such municipal corporation or corporations, may at any time call a joint meeting of the council or councils and the trustees of the township or townships, on a reasonable notice given by either, for the purpose of making joint rules and regulations for the government of such cemetery, or changing the same, and making such orders as may be found necessary for the application of moneys arising from the sale of lots, taxes, or otherwise. [66 v. 213, § 385.]

**Sec. 2542 R. S. [Vote, and record thereof.]** In all joint meetings, each member of the councils and each of the trustees shall have one vote in determining all questions; and the proceedings of all joint meetings shall be recorded by the clerk of the corporation having the greatest number of inhabitants. [66 v. 213, § 386.]

**Sec. 2543 R. S. [Adjoining townships may be admitted to participation, etc.; any municipal corporation or township may withdraw.]** Any township adjoining one in which a cemetery is established by the union of any of the bodies as hereinbefore provided, may, by consent of the trustees of such township and of the council or councils of the corporation, be admitted to an equal participation with the inhabitants thereof in the rights and privileges in such cemetery, upon such terms as may be mutually agreed upon, but the title and control of the cemetery shall continue vested in the corporation as above provided; and any municipal corporation or township which has heretofore united, or which may hereafter unite with any other municipal corporation or township, or both, in the establishment or control of a cemetery under the provisions of this chapter, may by a resolution of the council of such corporation or of the trustees of such township and with the consent of the council of the

remaining corporation and trustees of the remaining township or townships, withdraw from the management and control of such cemetery, and relinquish the interest of such corporation or township therein, and thereupon such cemetery shall be under the management and control of such remaining corporation and township or corporations and townships. [1883, January 25: 80 v. 6; Rev. Stat. 1880; 66 v. 214, § 390 (S. & C. 1564).]

**Sec. 2544 R. S.** [Public burial ground, etc., may be appropriated.] In the establishment of cemeteries as herein provided, any city or village and any township may make use of any public burial ground or cemetery ground which may be held by such city, village, or township, and may make use of any land which such city, village, or township, may have acquired by dedication, gift, or devise for burial purposes. [66 v. 213, § 387.]

**Sec. 2545 R. S.** [Purchase of lands; improvements, etc.] The council of any city or village, and the trustees of any township, may purchase of any cemetery association incorporated under existing laws, the lands, lots, and improvements of such cemetery association remaining unsold, for cemetery purposes, and take a conveyance thereof; but the purchase money in such cases shall be applied to the payment of the legal debts of such association, and to the embellishment and preservation of the land purchased, and such other purposes as the trustees of the cemetery may direct. [66 v. 213, § 388.]

**Sec. 2545a R. S.** [Municipality or township may transfer cemetery property to cemetery association.] The city council of any city or village, and the trustees of any township, may transfer to any cemetery association incorporated under existing laws, the lands, lots, and improvements of such cemetery, now owned and controlled by said city, village or township, for cemetery purposes; said cemetery association shall assume all legal debts on said cemeteries so transferred. [1904, April 22, 97 v. 165.]

**Sec. 2546 R. S.** [Rights and titles inviolate.] The rights and titles of lot owners, purchased prior to such sale and conveyance, shall not be questioned; and such lot owners shall continue to hold and occupy their lots, under such rules and regulations as shall be adopted for the government and regulation of such cemetery by the authorities making such purchase. [66 v. 214, § 389.]

**Sec. 2547 R. S.** [Clerk shall record plat of ground, etc.] It shall be the duty of the clerk of the corporation to record, in a book to be provided for that purpose, a plat of all grounds for cemetery purposes laid out into avenues, walks, paths, and



lots, and he shall execute to the purchasers of lots such conveyance as may be necessary to carry into effect the contracts of sale; and such conveyance shall, at the expense of the person receiving it, be recorded in a book to be kept for that purpose, by the clerk of the corporation. [66 v. 214, § 391.]

**Sec. 2548 R. S.** [Powers of council as to cemeteries.] The council of any city or village owning a public burial-ground or cemetery, whether within or without the corporation, may pass and provide for the enforcement of ordinances necessary to carry into effect the provisions of this chapter, and regulate such public burial-grounds and cemeteries, the improvement of the same, and the burial of the dead therein; define the tenure and conditions on which lots therein shall be held; and protect such burial-grounds and cemeteries and all fixtures thereon. [70 v. 274, § 392; (S. & C. 1563).]

**Sec. 2549 R. S.** [Power to sell portions of cemetery.] The council may sell any portion of such cemetery grounds not already used for the burial of the dead, which are unsuitable for burial purposes, and purchase with the proceeds thereof other suitable lands lying contiguous thereto; but no such sale shall be made until the council shall have contracted for an equal or greater quantity of land suitable for burial purposes: provided, that the trustees of any cemetery, elected under this chapter, for the purpose of paying any indebtedness, arising out of the purchase or improvement of such cemetery, shall, with the consent of the council of the corporation, where there is no union with any other corporation or township, and where there is such union, with consent of the bodies acting jointly as provided in section *twenty-five hundred and forty-one* have power to sell or mortgage such portion of the real estate, belonging to such cemetery, as has not been used for burial purposes, or as may not be, in the opinion of the trustees, needed for such purposes, and the money arising from such sale or mortgage, shall be applied by the trustees to the payment of such indebtedness, and to no other purpose, except upon such sale where there may be a surplus after the payment of such indebtedness, in which case such surplus money shall be used by the trustees in the improvement of such cemetery grounds, and for no other purpose. [70 v. 274, § 392; 64 v. 110; S. & S. 877.]

**Sec. 2550 R. S.<sup>1</sup>** [Burials may be prohibited within corporate limits.] The council may prohibit the interment of the dead within the corporation limits, and, for the purpose of making such prohibition effective, may not only impose proper fines and penalties, but shall also have power to cause any body, interred contrary thereto, to be taken up and buried without the limits of the corporation. [66 v. 214, § 393.]

(1) § 2551 R. S. was repealed in 85 O. L. 282.

**Sec. 2552 R. S. [Bond of managing trustee.]** The council may require the trustee who may be authorized to receive and disburse the moneys arising from the sale of lots, or otherwise, and to invest, manage, and control the property and funds in the hands of said trustees, to enter into a bond to the corporation with sufficient sureties, conditioned for the faithful performance of his duty, as such trustee, and account for all moneys by him received, and pay over to his successor all moneys or other property unexpended. And such bond shall be filed in the office of the corporation clerk. [1887, March 16: 84 v. 84; Rev. Stat. 1880; 66 v. 214, § 395.]

**Sec. 2553 R. S. [Applicability to existing cemeteries.]** The provisions of this chapter relating to the establishment of cemeteries by municipal corporations and township trustees, shall govern cemeteries already so established, so far as the same may be applicable. [66 v. 214, § 396.]

**Sec. 2554 R. S. [Property in village supporting cemetery exempt from tax for purchase of hearse for township.]** All property within any village, in which there is a cemetery established and maintained by such village, shall be exempt from taxes for the purchase or maintenance of cemeteries, or for the purchase of a hearse, or for the construction of a vault, under the superintendence of the township trustees, and for the use of the township exclusive of the village. [1880, April 2: 77 v. 117; Rev. Stat. 1880; 66 v. 74, § 1.]

**Sec. 2555 R. S. [Conveyance of lands abandoned for cemetery purposes.]** When a city or village holds any land or lands within its limits which shall have been used as a cemetery or burial-ground, and in which interments have been prohibited by such municipal corporations, and it shall have been decided to remove the bodies interred therein, it shall be lawful for the council to sell or otherwise dispose of any such land or lands to the purchaser of the same, provided that such sale or other transfer of such land shall not operate to give such purchaser possession of the same until the bodies therein interred shall have been removed from such cemetery, and all monuments and tombstones be removed and re-erected at the place of re-interment of the remains of each person, respectively. [68 v. 124, § 1.]

**Sec. 2556 R. S. [Council of villages may tax for hearse or vault on vote of electors.]** The council of a village may levy a tax in such amount as it may determine, either to purchase a hearse or to construct a vault for the dead, for the use of the village, to be under the control of the trustees of cemeteries of

the village, where there is such board, otherwise under the control of the council, or a person appointed by it; but the question of levying such tax, for either or both of such purposes, and the amount asked therefor, shall be separately submitted to the electors of the corporation, at a general election, twenty days' notice thereof having been previously given, by posting in at least three public places in the village; the notice shall state specifically the amount to be raised, and for what purpose; and if a majority of all the votes cast at such election is in favor of either or both of such propositions, the same shall be considered adopted, and the tax herein provided for authorized. [75 v. 46, § 1.]

**Sec. 2557 R. S. [Form of ballot.]** The electors voting at such election shall have placed on their ballots the words, "Tax for Hearse—Yes," or "Tax for Hearse—No," and upon the same ballot, "Tax for Vault—Yes," or "Tax for Vault—No," and may vote for one proposition and against the other, or for or against both. [(75 v. 46, § 2).]

**Sec. 2558 R. S. [Council may borrow money in anticipation of collection of tax.]** When a tax for erecting a vault has been voted in any village, the council thereof may, in anticipation of such tax issue the bonds of such village in an aggregate amount not exceeding the tax voted, of denominations not less than fifty dollars, bearing interest at a rate not exceeding six per centum, payable not later than two years from the date thereof, and signed by the mayor and clerk of the village; and such bonds shall be paid from the tax so voted, and the proceeds of the sale thereof shall be used solely for the construction of such vault. [(76 v. 43, § 1).]

**Sec. 1464a R. S. [Use of land near dwelling-house in city of third or fourth grade, second class.]** Where the trustees of any township own land for cemetery purposes, situated in a city of the third or fourth grade of the second class, they may use such land for cemetery purposes within one hundred (100) feet or the width of a street from any dwelling-house the same as cemetery associations are now authorized to do by section 3773 [3573] of the Revised Statutes of Ohio, as amended March 22, 1893. [92 v. 161.]

**Sec. 1473a R. S. [Abandonment, etc., of graveyard, etc., owned by city or village, in certain cases.]** That where any graveyard, burial-ground or cemetery is located without the corporate limits of any city or village, and not further away therefrom than one mile, and the title to and the possession of such graveyard, burial-ground or cemetery is in such city or village,



or the same is under the control of any of the authorities of any city or village, and said city or village has failed to protect the same or keep it inclosed with fences for two years, any five freeholders whose property is in the vicinity of such graveyard, burial-ground or cemetery, may apply by petition to the probate court of the county where such graveyard, burial-ground or cemetery is located, stating in their petition that such city or village has failed to protect such graveyard, burial-ground or cemetery, and asking for an abandonment or removal of such burial-ground, graveyard or cemetery; which upon final hearing, if it appears to the court to be to the public interest to have such graveyard, burial-ground or cemetery abandoned and removed, it shall so order. In which action such city or village shall be made a defendant and shall be served with summons as in other actions provided. Should such city or village fail to remove such graveyard, burial-ground or cemetery for a period of six months after it has been so ordered by the court, then the court shall order such premises sold as upon execution; provided, that such sale or other transfer of such land shall not operate to give a purchaser possession of the same until the bodies therein interred shall have been removed, as provided in section 2555 of the Revised Statutes of Ohio. [89 v. 272.]

*Cemetery Board in Villages.*

**Sec. 2518. [Appointment of board of cemetery trustees; number of members, term.]** The mayor of any village owning a public burying ground, or cemetery, or which may hereafter be provided with the same, shall have the power to appoint a board to be known as the board of cemetery trustees; said board of cemetery trustees shall consist of three members, whose term of office shall be three years; provided, however, that the term of office of any such board first appointed in any village, subsequent to the passage of this act, shall extend until the first municipal election has been held thereafter and the officers chosen at said election duly qualified and placed in office. Thereafter the mayor shall appoint a board whose term shall expire as follows: One trustee for a term of three years, one trustee for a term of two years, and one trustee for a term of one year. And thereafter each year after the annual municipal election has been held and the newly elected officers have been duly qualified and placed in office the mayor shall at the first meeting night of the council within his village appoint one member on the board of cemetery trustees whose term of

office shall be for three years, or until his successor in office shall have been regularly appointed and qualified.

**[Vacancies.]** In case a vacancy in said board of cemetery trustees in any village where such board shall have been appointed, in accordance with the provisions of this section, by reason of the death, disability, or removal from office of any member or members of said board, the mayor shall appoint a member or members to fill such vacancies, and the person so appointed shall serve out the unexpired term or until his successor is regularly elected and qualified. All appointments to fill vacancies as aforesaid shall be made at the first meeting night of the council after such vacancy shall have been brought to the attention of the mayor and council.

**[Removals.]** The mayor of any village where such board of cemetery trustees is appointed in accordance with the provisions of this section shall have power to remove from office any member of said board for any misconduct, neglect of duty or malfeasance in office;

**[Powers and duties.]** said board of cemetery trustees shall have all the powers and perform all the duties prescribed by law in this chapter for such trustees; and said board shall organize in accordance with the provisions of section 2533a of the Revised Statutes of Ohio. [Re-enacted 1904, May 3, 97 v. 538; 66 v. 210.]

## XIV

PUBLIC BUILDINGS AND INSPECTION  
OF BUILDINGS.<sup>1</sup>

## 1. CLEVELAND CITY HALL COMMISSION.

**Sec. 2559—1 R. S.** [Cleveland may erect new city hall; commissioners; number; appointment; duties and powers.]<sup>2</sup> In any city of the second grade of the first class, the council of such city may, by ordinance, declare the necessity for the erection, completion and furnishing of a new city hall for any such city, to be used for the public offices of the corporation, and such other public purposes as the council may authorize; thereupon there shall be a board of five commissioners, composed of five (5) citizens of such city, to be appointed by the mayor, and approved by the council, not more than three of whom shall be from the same political party, whose duty it shall be to secure the necessary land, by purchase or appropriation, as a location and site for the erection of such city hall, and to erect, build, complete and furnish such new city hall in such city; and upon the appointment as aforesaid of said commissioners, all power to procure such site or location, either by appropriation or purchase, as said commissioners shall deem best, and to erect, build, complete and furnish a city hall for such city, shall devolve upon, vest in, and be exercised by said board, and in exercising such power and carrying out the object of their appointment, said board shall be governed by the following provisions. [93 v. 549.]

(1) Sections of Revised Statutes carried here formed part of Chap. 8, Div. 8, Title XII., R. S. Of the sections in this chapter, §§ 2573a, 2573a—2, 2573b, 2573c, 2573c—1, 2573c—2, 2575c—3, 2573d, 2573—1, 2573—2, and 2573—3 R. S. relate solely to state inspection of workshops and factories, and are omit-

ted here. Other sections not given here are repealed by the Code.

(2) **Cleveland city hall act.**—§ 216 of the Code provides that persons appointed pursuant to this act, shall continue to act till the work is complete and it shall then be turned over to proper municipal authorities.



**Sec. 2559—2 R. S.** [Name of board; expenses, removal, vacancy.] Said board shall be known as the board of city hall commissioners, and they shall receive their necessary expenses in attending to their duties, which shall be paid out of the fund hereinafter created for the purpose of carrying out the provisions of this act. Said board shall serve until the building and furnishing of such city hall is completed, but not to exceed five years and nine months from the date of their appointment; provided, the mayor, with the approval of the council, may remove any of said commissioners for misconduct in office, and the vacancy thereby created shall be filled in the same manner and from the same political party as the original appointment, and all vacancies in the office of commissioner shall be filled in the same manner from the same political party as the original appointment.<sup>1</sup> [1902, May 6: 95 v. 877; 93 v. 549.]

(1) This section is given as amended May 6, 1902. See Code § 216 (fourth paragraph).

**Sec. 2559—3 R. S.** [President; meetings; record.] Said commissioners shall select from their number a president, and shall hold regular meetings at such time and places as they may agree upon, and special meetings under such regulations as they may determine, and shall cause to be kept a full record of their proceedings. Said commissioners shall each receive the sum of five dollars per meeting, as compensation, for each and every meeting attended by them from and after the passage of this amending act, but in no case shall such compensation exceed twelve hundred dollars in any one year to any member of said commission.<sup>1</sup> [1902, May 6: 95 v. 877; 93 v. 549.]

(1) This section is given as amended May 6, 1902. See Code § 216 (fourth paragraph).

**Sec. 2559—4 R. S.** [Power to appoint clerk, architect and other necessary employes; compensation of same; to adopt suitable plan for hall; contracts; advertising for plans, etc.] Said commissioners shall have power to appoint a clerk, architect, superintendent and other necessary employes, fix their compensation and adopt a suitable plan and design for such city hall, and make all contracts for the procuring of the necessary site, and for erecting, completing and furnishing such city hall; and no contract which they enter into, or alteration or modification

thereof shall be valid until assented to at a regular or special meeting and concurred in by a majority of all the members thereof, and such assent entered on the minutes of the proceedings. And it shall be the duty of such commissioners in securing the most suitable plans together with the specifications and estimates for such city hall, to advertise for not less than three (3) consecutive weeks in such newspapers as they may deem proper, in and of general circulation in such city, for plans, specifications and estimates of such city hall; said plans, specifications and estimates to be presented within such time after such advertisement as the board may direct; and shall allow full and fair competition among all architects who shall desire to submit plans, specifications and estimates for such city hall. [93 v. 550.]

**Sec. 2559—5 R. S. [Power to condemn property; resolution therefor; duty of corporation counsel; appropriation proceedings governed by what laws.]** Said board of commissioners shall have power to appropriate, enter upon and condemn for public use, by any such city, for city hall purposes, any private property within such city, and when such board shall determine to appropriate property for such use a resolution to that effect shall be passed by the board and entered upon its minutes, declaring the intention to appropriate such property and the necessity therefor, with a pertinent description of the property to be appropriated, which resolution shall be certified to the corporation counsel of such city, whose duty it shall then be to apply, in writing, in the name of such city, to any court of competent jurisdiction for the impaneling of a jury to assess the compensation to be allowed the owner or owners of property sought to be appropriated, in the manner now provided by law for the impaneling of juries to assess the compensation to be allowed the owners of property appropriated by municipal corporations for other purposes; and such appropriation proceedings shall in all other respects be governed by the laws now in force governing the appropriation of private property by municipal corporations for public purposes. [93 v. 550.]

**Sec. 2559—6 R. S. [How money may be expended; commissioners or city employes not to be interested in contracts.]** No money shall be expended on account of such city hall unless first authorized by such commissioners, and upon warrants signed by their president and clerk, drawn upon the director of accounts of such city, to be paid by the treasurer of such city upon the warrant of such director, out of the fund hereinafter provided; and no commissioner or person holding appointment

from said board, nor any officer or employe of the city, shall be interested, either directly or indirectly, in any contract concerning such city hall or the material or site therefor. [93 v. 551.]

**Sec. 2559—7 R. S. [Plans and specifications, etc., to be prepared; distribution of same.]** Such commissioners before entering into any contract for such city hall shall cause plans and specifications, details, drawings, and forms of bids to be prepared, and when adopted by them, they may, in their discretion, cause the plans and drawings to be lithographed, and the specifications and forms of bids, contracts and bonds to be prepared, and have the same printed for distribution among the bidders. [93 v. 551.]

**Sec. 2559—8 R. S. [How contracts to be made; alterations or modifications in contract.]** All contracts shall be made in writing, in the name of such city, and signed by the president and clerk of said board, and by the contractor, and be approved by the corporation counsel. When it becomes necessary, in the opinion of said board, in the prosecution of the work, to make alterations or modifications in the contract, such alterations or modifications shall only be made by order of the board, and such order shall be of no effect until the price to be paid for the work, or materials, under such altered or modified contract has been agreed upon in writing, and signed by the contractor and the president of said board. [93 v. 551.]

**Sec. 2559—9 R. S. [Advertising for bids.]** Said board shall not enter into any contract for work in the erection and completion of such city hall without first causing fifteen (15) days' notice to be given in one or more newspapers, of general circulation, in such city, for sealed proposals for doing the work and furnishing the materials therefor; provided, that said board shall not be required to advertise for bids for making and printing the drawings, specifications and forms of bids, contracts and bonds. [93 v. 551.]

**Sec. 2559—10 R. S. [Bids.]** All bids shall be enclosed in a sealed envelope and deposited with the clerk of said board; and such sealed envelope shall have endorsed thereon the nature of the same, and the name of the bidder; and all bids shall be opened at a regular meeting of the board, and at an hour to be indicated in said notice. Each bid shall be accompanied with a bond, signed with sufficient sureties, for the acceptance and execution of the contract, and the securing of the same if awarded by the board; or the bidder may deposit with the



board, in lieu of such bond, a certified check, or cash, in such sum as the board shall indicate; and in case of refusal of the bidder to enter into a contract in accordance with his bid, and furnish the security therein required, within such reasonable time as the board may determine, said bond shall be put in suit and the amount collected, paid into the fund hereinafter provided for; if a check, or cash, is deposited the amount shall immediately be paid into such fund. [93 v. 551.]

**Sec. 2559—11 R. S.** [Awarding of contract; bond of successful bidder.] Said board shall enter into contract with the lowest and best bidder, upon his giving bond to such city with such sureties as the board shall approve that he will perform the work and furnish the materials in accordance with his contract, and that the sureties agree in advance to such modifications and alterations as may be made by the board and the contractor, within the limits of the penal sum mentioned in the bond; and on failure of such bidder, within a reasonable time to be fixed by the board, to enter into bond with the sureties before provided, a contract may be made with the next lowest and best bidder, and so on, until a contract is effected with a contractor giving bond as aforesaid; provided, that the board may let the work in whole or in parts, and may receive bids for labor and material separately, as they may deem best, and may reject any and all bids. [93 v. 551.]

**Sec. 2559—12 R. S.** [Fund to defray cost of city hall; bonds to conform to requirements of certain statutes.] To provide a fund to pay the cost and expense of procuring the necessary land as a location for, and the erection, completion and furnishing of such city hall, under the provisions of this act, the council of any such city may and it is hereby authorized to issue and sell the bonds of such city to an amount not to exceed in the aggregate one million five hundred thousand dollars for procuring such land and erecting, completing and furnishing such city hall. Said bonds shall be issued and made payable at such time or times and shall bear interest at such rate not to exceed four per cent. per annum, payable semi-annually, as the council of such city shall determine; said bonds, except as provided in the foregoing, shall in all respects conform to the requirements of chapter 2, division 9, title 12 of the Revised Statutes of Ohio.<sup>1</sup> [May 6, 1902: 95 v. 877; 93 v. 549.]

(1) This section is given as amended May 6, 1902. See Code § 216 (fourth paragraph).

**Sec. 2559—13 R. S.** [Fund to pay interest on bonds and bonds themselves at maturity.] For the purpose of paying the interest on said bonds, and for the further purpose of providing a fund for the payment of such bonds at maturity, the council of such city may use and apply any money received by such city from any gas company or electric light company under any agreement heretofore or hereafter made; and for the purpose of providing such further sum as may be necessary to pay the interest on such bonds and the principal of the same at maturity, the council shall, in addition to the other levies authorized by law, levy annually a sufficient tax therefor on all property of such city subject to taxation, and such taxes shall be levied and collected as other taxes. [93 v. 552.]

## 2. CLEVELAND GROUP PLAN FOR PUBLIC BUILDINGS.

**An act to create a board of supervision in the erection simultaneously of public municipal and county buildings.**<sup>1</sup>

[§ 1.] That whenever any city in the state of Ohio, having a population of more than 380,000, or the county in which the city is located, contemplates the erection of buildings for public, municipal, or county purposes within the boundaries of such city, such city by its council may request the governor of the state of Ohio to appoint a board of supervision composed of three experts, two at least of whom shall be architects, the members of which board shall receive salaries not exceeding five thousand dollars each per annum, to be fixed by the city authorities prior to making request upon the governor for appointment, and paid by the city requesting such appointment.

[§ 2.] Such board when appointed shall have the supervision and control of the location of all public, municipal or county buildings to be erected upon ground previously acquired within the limits of the city, and shall have control of the size, height, style and general appearance of all such buildings, for the purpose of procuring, in their location and erection, the greatest degree of usefulness, safety and beauty.

[§ 3.] No plans shall be adopted and no work carried on by such city or county, wherein such board shall be appointed, in the erection of such public, municipal or county buildings within the boundaries of such city, until all plans, specifications and locations shall have first been submitted to and approved by such board or a majority thereof.

[§ 4.] Such board shall be appointed for such time as shall be requested by the city, and the governor, at the re-

quest of the city, may remove any member of such board and appoint a new member to fill the vacancy thus created, if in his judgment it is wise so to do. [May 6, 1902, 95 v. 879.]

(1) See § 216 of the Code.

### 3. JOINT VILLAGE AND TOWNSHIP BUILDING.

**An act to provide for village and township to jointly enlarge, improve or erect a public building.**

[Sec. 1.] [Village and township may jointly enlarge, improve or erect public building.] That the electors of an incorporated village and the electors of the township in which the village is situated, may if both so determine, as herein after provided, unite in the enlargement, improvement or erection of a public building.

[Sec. 2.] [Application to mayor and township trustees.] Whenever the electors of a village and township in which said village is situated desire to jointly enlarge, improve or erect a public building, application shall be made to the mayor of the village, signed by not less than twenty-five resident freeholders of said village, and an application shall also be made to the township trustees of said township, signed by not less than twenty-five resident freeholders of said township, who are not residents of said village.

[Sec. 3.] [Submission of question of tax to a vote.] At the next general municipal and township election after said applications have been filed with the mayor of said village and trustees of said township as provided herein, the question as to whether or not a tax shall be levied upon all the property subject to taxation in said village and township for the enlargement, improvement or erection of a public building, shall be submitted to the electors of said village and said township: Provided, however, that ten days' notice that said question will be submitted to the electors, shall be given, by the mayor of the village and the trustees of the township, in some newspaper of general circulation in said village and township; which notice shall state the maximum amount of money proposed to be used in the enlargement, improvement or erection of said public building and the rate of tax proposed to be levied.

[Sec. 4.] [Vote required.] If at such election two-thirds of the electors of said village and township voting, vote in favor of said improvement, the council of said village and the trustees of said township shall jointly take such action as is





necessary to carry out the improvement contemplated. [1904, April 26, 97 v. 483.]

#### 4. LEASING PUBLIC HALLS.

**Sec. 2566 R. S.** [Leasing hall, or part thereof.] When there is a public hall, erected by taxation, in any city of the second class or village, and the building or any part thereof may not be needed for public business the council shall lease the building or part thereof, as the case may be, for private offices, lectures, or like purposes, and for such length of time, and upon such terms as shall seem to it proper, and the money received for rents shall be forthwith paid into the treasury of the municipal corporation; and when a municipal corporation and a township have united in erecting such hall as aforesaid, they shall jointly have the same power to lease as above provided, and the amount received shall be divided equitably by the council and the township trustees, and the amount belonging to the municipal corporation shall be paid by the party receiving it, into the corporation treasury, and the amount belonging to the township shall be paid by such trustees into the township treasury.<sup>1</sup> [70 v. 55, § 1.]

(1) **Effect on taxation.** — part so rented or leased is subject Where a municipality rents or to taxation. *Scott v. Athens*, 1 N. leases a part of a public hall, the P. 94.

**Sec. 2567 R. S.** [Collection of rent, when used for certain purposes.] Whenever any such hall building, in whole or in part thereof, or any room or rooms, or parts of rooms therein shall be used or occupied by any city, village, or township officer, or by a justice of the peace, or by any mayor of the city or village, for the transaction of any other business than that required in the administration of public affairs, either by himself, or partner in business, it shall be the duty of the trustees of such township or council of such city or village, or of the council and trustees, acting together, as the case may be, to collect from such public officer or parties in business, such sum for rent as may be just and equitable. [70 v. 55, § 2.]

**An act to authorize the councils of municipal corporations to permit the use of public buildings under their control.**

[Sec. 1.] [Council may permit use of public buildings.] That the councils of municipal corporations are hereby authorized to permit the use of public buildings under their control upon such terms and conditions as they may by ordinance provide. [1904, April 23, 97 v. 278.]

## 5. INSPECTION OF BUILDINGS.

**Sec. 2568 R. S. [Examination of public hall, etc., as to safety in case of fire.]** On application of the owner or person having control of an opera house, hall, theater, church, schoolhouse, hospital, medical institute, asylum, or other buildings used for public assemblages, in any municipal corporation, the mayor, civil engineer, and chief engineer of the fire department, or if such corporation has no such engineer, the mayor and two members of council, shall carefully make a joint examination of such opera house, hall, theater, church, schoolhouse, hospital, medical institute, asylum, or other building to ascertain the means provided thereat and therein for the speedy and safe egress of the persons that may at any time be there assembled, and the means provided for extinguishing a fire, at or in such place; provided, that when the assembly rooms of such church are situated upon the ground floor, with a sufficient number of low windows, in the opinion of the commission above provided for, to secure safe and yeas [easy] means of escape in case of alarm, they shall grant the certificate mentioned in the next following section.<sup>1</sup> [90 v. 3; 62 v. 139, § 3; 74 v. 61, § 1; S. & S. 636.]

(1) **Power of municipality** to see paragraph 13, § 7 of the Code, provide for inspection of buildings, p. 52.

**Sec. 2569 R. S. [Certificate in such case.]** If, upon such examination, it is found that such opera house, hall, theater, church, schoolhouse, or other building is abundantly provided with means for speedy and safe egress of the persons who may at any time be there assembled, and, if above the first floor, that it is provided therein with water or other equally efficient agency, and proper means to apply it, so that any fire which may occur at such place can be immediately extinguished, the mayor and persons so acting with him, or a majority of the three, shall issue to such owner or person having control as aforesaid, a certificate of the fact, which shall continue in force one year, unless sooner revoked by council. [62 v. 139, § 3; S. & S. 636.]

**Sec. 2570 R. S. [Re-examination in case of change in building.]** If any change or alteration is made in such building, the owner or person having charge of it shall notify the mayor of the fact, who shall cause to be made a re-examination in all respects like that provided for in the last section, and if upon such examination such owner, or person having control, is entitled to such certificate as is mentioned in the last section, it

shall be issued to him, with like effect. [62 v. 139, § 3; S. & S. 636.]

**Sec. 2571 R. S. [Appeal of owner or person in control from refusal to issue certificate.]** If any owner or person having control of such place, as aforesaid, shall feel himself aggrieved by the refusal of such officers to issue any such certificate, he may appeal from the decision to the council, which shall appoint three disinterested persons to examine the premises, any two of whom may issue the certificate provided for in sections *two thousand five hundred and sixty-nine* and *two thousand five hundred and seventy*. [62 v. 139, § 3; S. & S. 636.]

**Sec. 2572 R. S. [Penalties against owner or person having control.]** Whoever, being the owner or having control as an officer, agent, or otherwise, of any opera house, hall, theater, church, schoolhouse, college, academy, seminary, infirmary, sanitarium, children's home, hospital, medical institute, asylum, or other building used for the assemblage or betterment of people, in a municipal corporation, county or township in the state of Ohio, permits it to be used when any door affording exit therefrom is locked or barred, or opens inwardly; when the place is not provided with ample means for the safe and speedy egress of the persons who may be there assembled; when sufficient water and proper means to apply it, or other efficient means are not provided on each floor to extinguish any fire which may occur therein; or when the certificate provided for in section twenty-five hundred and sixty-nine or section twenty-five hundred and seventy, which certificate shall also apply to buildings mentioned in section twenty-five hundred and seventy-two, as the case may be, has not been issued, or is not in full force, shall be deemed guilty of a misdemeanor, and on conviction thereof before any court of competent jurisdiction shall be fined not more than five hundred (500) dollars, nor less than fifty (50) dollars, and ten (10) dollars additional for each day or night such building is permitted to be used after such conviction is had until such changes, alterations or additions have been made sufficient to warrant the issuing of certificate by the chief inspector of workshops and factories;

**[Fines for benefit of city or county.]** And such fines and costs shall be recovered in the name and for the use of the municipal corporation, if such building is located within the corporate limits, if not then for the use of the county in which located and suit is brought;

**[Duty of mayor or prosecuting attorney.]** And it shall be the duty of the mayor, with the aid of the police, or the prosecuting



attorney, with the aid of the sheriff, if such building is not located within a municipal corporation, to see that the provisions of this act are strictly enforced. [93 v. 34; 92 v. 408; 90 v. 4; 62 v. 139, § 3 (§ 4); S. & S. 636.]

**Sec. 2572a R. S.** [Inspections and certificates dispensed with in certain cases; notice of refusal; requirements for the issuing of certificates, etc.] That whenever any structure referred to in section 2572 shall have been inspected by the state inspector of workshops and factories, and such inspector shall have issued to the owner thereof or to his agent, a certificate that such structure is properly arranged for the safe and speedy egress of persons who may be assembled therein, and also properly provided with the means for the extinguishment of fire at or in such structures, as now required by law, then such certificate shall dispense with other inspections and certificates required by law in regard to the safety of such structures as are mentioned in section twenty-five hundred and seventy-two; and in case such inspector shall find on [no] inspection that such structure is not properly arranged for the safe and speedy egress of persons who may be there assembled, or not properly provided with means for the extinguishment of fire at or in such structure, as now required by law, or that such structure is such as to endanger the lives of the persons who may be there assembled, from fire or other cause, he shall notify the owner, officer or agent in charge of such structure and the mayor of the municipal corporation, if such structure is located therein, if not then the prosecuting attorney of the county wherein the same is located, in writing, of the fact that he refuses such certificate, specifying his reasons and the alterations, additions and appliances necessary to be made and furnished before a certificate will be issued; and no certificate required by law, in regard to the safety of such structure, shall be issued by the mayor or any officer or person under any provision of the law till the requirements of the foregoing notice are complied with to the satisfaction of the state inspector, and it shall be the duty of the mayor of any municipality, with the aid of the police, or the prosecuting attorney, with the aid of the sheriff, upon receiving such notification, to prohibit the use of such buildings for the assemblage of people until the necessary changes, alterations and additions have been made and the inspector's certificate has been issued. [92 v. 409; 90 v. 4; 88 v. 85; 86 v. 46.]

**Sec. 2572b R. S.** [When inspections to be made.] It shall be the duty of the chief inspector<sup>1</sup> of workshops and factories, or his district inspectors, to make inspection of such build-

ings as are provided for in sections 2568, 2569 and 2572 of the Revised Statutes of Ohio, as often as he may deem necessary, or upon the written demand of the agent or owner of such structure, or upon the written request of five or more citizens of the municipal corporation, county or township wherein such structure is located,

[Inspector to have access to buildings.] and the chief inspector or district inspectors shall have access to all such buildings at any time it may be deemed necessary to inspect same.<sup>2</sup> [93 v. 35; 92 v. 409; 87 v. 279; 86 v. 46, 47.]

(1) **Duties of inspector.**—It is no part of the duties of building inspectors to see that the funds and records are placed in what they regard as a safe and suitable building for that purpose. State *ex rel.*

v. Commissioners of Ottawa Co., 5 N. P., 260, 262.

(2) **Purpose of inspection.**—The purpose of these statutes is to insure safe buildings for the assemblages of the people. *Id.*

**Sec. 2573 R. S.** [Duties of factory-men, hotel-keepers, etc., as to fire-escapes.]<sup>1</sup> It shall be the duty of any owner<sup>2</sup> or agent for owner of any factory, workshop, tenement house,<sup>3</sup> inn, or public house, if such factory, workshop, tenement house, inn, or public house be more than two stories high,<sup>4</sup> to provide a convenient exit from the different upper stories of said building, which shall be easily accessible in case of fire, and any owner or person having control of any such inn or public house where travelers or boarders are lodged in any story above the second story of the building, shall also provide a good rope or other life line for each sleeping room for guests in such stories.<sup>5</sup> [1883, April 19: 80 v. 187; Rev. Stat. 1880; 74 v. 176, § 1.]

(1) **Section not limited to municipality.**—This section is not confined to buildings in municipalities. Rose v. King, 49 O. S. 213.

(2) **Meaning of "owner."**—Does not mean owner of the fee, but owner of the factory. Lee v. Smith, 42 O. S. 458.

(3) **Tenement house defined.**—See Rose v. King, 49 O. S. 213.

(4) **More than two stories.**—A building more than two stories

requires a fire escape from the second as well as the higher stories. Rose v. King, 49 O. S. 213.

(5) **Exercise of police power.**—A statute requiring fire escapes on certain buildings and on failure to erect them, providing a punishment by fine and an injunction to enjoin use of building, is but an exercise of police power. Cincinnati v. Steinkamp, 54 O. S. 284.

**Sec. 2574 R. S. [Duty of mayor to require such escapes; penalty for failure to comply.]** It shall be the duty of the mayor of each city or village to require the owner or agent for owner of any factory, workshop, tenement house, or inn or public house, within the meaning of the next preceding section,<sup>1</sup> to comply with the requirements of said section within sixty days from the serving of a notice by the mayor so to do,<sup>2</sup> unless such owner or agent for owner shall have previously complied with the requirements of said preceding section, and if any such owner or agent of owner neglects or refuses to comply with the requirements of the next preceding section within the time specified in said notice, he shall forfeit not less than fifty nor more than three hundred dollars for each and every month he so fails to comply therewith, the amounts so forfeited to be recovered in the name of and for the use of such city or village in an action in the police court or other competent tribunal; such owner or agent for owner may also be held for civil damages to the party injured. [1883, April 19: 80 v. 187, 188; Rev. Stat. 1880; 74 v. 176, § 2; 76 v. 33, § 1.]

(1) This refers to § 2573 R. S.,  
*supra*.

recovering from owner of tenement house for injuries received through neglect to comply with § 2573 R. S. *Rose v. King*, 49 O. S. 213.

(2) **Effect of failure to give notice.**—Failure of mayor to give notice does not prevent tenant from

**Sec. 2575 R. S. [Mayor, etc., to examine building once a year; compensation.]** It shall be the duty of the mayor of such city or village, personally, or by the marshal or head of police of such city or village, or other proper person whom the mayor may appoint acting under the direction of the mayor, as inspectors of fire-escapes to carefully examine such factories, workshops, tenement houses, inns or public houses once in each year, and report all violations of the provisions of sections *twenty-five hundred and seventy-three* and *twenty-five hundred and seventy-four* to the council of such city or village, when proceedings shall be commenced, without unnecessary delay, against the person so offending, and said mayor, marshal, or head of police, or person so appointed by the mayor to act as inspector of fire-escapes shall be entitled to receive for said notices and said examination such fees as the council may by ordinance provide. [1883, April 19: 80 v. 187, 188; Rev. Stat. 1880; 74 v. 176, § 3.]



**An act to prevent loss of life in public halls and theaters.****[Sec. 1.] [Public halls and theaters to be provided with diagrams of aisles and exits for guidance of audience in case of fire.]**

That whoever, being the owner or lessee, or having control as an officer, agent or otherwise, of any opera house, theater or hall, permits the same to be used for the purpose of public assemblies without having in a conspicuous place for distribution a diagram of the aisles and all exits of the place, each floor to be shown separately, with instructions designated on said diagram for the guidance of audiences in case of fire or other casualties shall be fined not more than one thousand dollars and not less than twenty-five dollars for each and every offense; provided, however, that it shall be sufficient to print such diagram in programs, on separate pages thereof unencumbered by other matter, to which, in addition, attention must be called by notice printed over the program proper; the diagram provided for in this section to be drawn upon a scale of not less than twenty feet to the inch.

**[Sec. 2.] [Exits to be made conspicuous and illuminated.]**

That whoever, being the owner or lessee, or having control as an officer, agent or otherwise, of any opera house, theater or hall having a seating capacity of seven hundred and fifty or more, each seat space computed at twenty by thirty inches, permits the same to be used for the purpose of public assemblies without having stationed at each outside exit during the entire time of every program rendered a male person of the age of eighteen years or upwards, and having each and every outside exit during the entire time of every program rendered a male person of the age of eighteen [years] or upwards, and having each and every outside exit thereof painted or lettered "exit," each letter to be not less than six inches in length and three inches in breadth, and each "exit" to be illuminated by an electric light to be operated on a circuit independent of any other lights and to be operated from the box office in said building; or by a gas light fed by an independent pipe from the front or end of the building opposite the stage and disconnected from any other pipe supplying such building, or in case there is neither electrical light nor gas light in the municipality

or township in which such building is located, there may be used a lamp or lantern in which nonexplosive oils as a fuel must be used, and each of said lights to show a red light; the switchboard of such electric light and stopcock for the gas to be enclosed securely under lock and key; shall be fined not more than one thousand dollars nor less than twenty-five dollars.

**[Sec. 3.] [Asbestos or steel curtain to be provided.]** That whoever, being the owner or having control as an officer, agent, or otherwise of an opera house, theater, or hall having a seating capacity of seven hundred and fifty or more, each seat space being computed as twenty by thirty inches, permits the same to be used for the purpose of public assemblies without having an asbestos or steel stage curtain of standard quality that will stand a fire test satisfactory to the officers named in section five hereof, said curtain to lap over the stage opening the sides and top not less than twelve inches; to have attached to said curtain at top and bottom, the full width of the curtain, iron gas piping not less than one and one-half inches inside diameter; all guide wires of such curtain to be of steel and to be not less than one-fourth inches in diameter;

**[Proscenium wall.]** and without having a proscenium wall in each of such buildings either of brick or other fire proof material in a manner satisfactory to the officers named in section five hereof; and the opening in said proscenium wall other than the stage opening, to be provided with fire proof doors, shall be fined not more than one thousand dollars nor less than twenty-five dollars for each and every such offense.

**[Sec. 4.] [Penalty for allowing wire, scenery, etc., to obstruct curtain.]** That whoever, being the owner or lessee or having the control as an officer, agent or otherwise, of any opera house, theater or hall having a seating capacity of seven hundred and fifty or more, computing each seat space at twenty by thirty inches permits the same to be used for the purpose of public assemblies or allows any wire, light, reflector, scenery or any other thing whatsoever to stand in or across the space that the asbestos curtain, required by section 3 of this act, would

need for its complete downward passage shall be fined not more than one thousand dollars nor less than twenty-five dollars.

**[Sec. 5.] [Examination of theaters and halls and certificate of compliance.]** It shall be the duty of the mayor, chief of fire department and building inspector of any municipal corporation, or if such corporation has no chief of police or building inspector, then the mayor and two members of council, and in townships, the trustees thereof to carefully make an examination of the buildings described in sections 1 and 2 of this act, to ascertain whether the provisions of this act have been complied with; and if upon such examination it is found that such building is arranged and provided for in all things as required by the provisions of this act, then such mayor, chief of police and building inspector or such mayor and members of council or the trustees of the township shall issue to the owner or person having control of the building described in this act a certificate of such fact, which shall continue in force one year; provided, however, that in case such officers shall find upon examination or inspection that any building or structure described in this act is not properly arranged as herein provided, they shall notify the owner, lessee, officer having control, agent or otherwise of such structure or building of such fact, and it shall be the duty of the mayor of a municipality, with the aid of the police or of the prosecuting attorney with the aid of the sheriff, to prohibit the use of such building for the assemblage of people until the necessary changes have been made, whereupon a certificate shall be issued to the owner, lessee or manager of such building as first provided in this section.

**[This act not to apply to open air or summer theaters.]** Provided that nothing in this act shall be held to apply to buildings known as open air or summer theaters located in parks or other public places, in which all the seats are upon the first or ground floor and in which the auditorium is entirely open at the sides.

**[Sec. 6.] [Power of council to make further regulations.]** The council of any municipal corporation may make such further regulations as it may consider necessary for public safety.



[Sec. 7.] [When this act takes effect.] This act shall take effect on September 1st, 1904. [1904, April 23, 97 v. 264.]

## XV

PLATS.<sup>1</sup>

## 1. ORIGINAL PLATS.

**Sec. 2597 R. S.** [Proprietor to cause plat of proposed village, etc., to be made.] When any person wishes to lay out a hamlet<sup>2</sup> or village, or subdivision or addition to any municipal corporation, he shall cause it to be surveyed, and a plat or map of it made by a competent surveyor; in which plat or map shall be particularly described and set forth the streets, alleys, commons, or public grounds, and all in-lots and out-lots and fractional lots within or adjacent to such hamlet or village, the description to include the courses, boundaries and extent.<sup>3</sup> [29 v. 350, § 1; 47 v. 52, § 1; S. & C. 1482; S. & C. 1489.]

(1) **Sections on plats.**—The sections carried under this heading formed part of Chap. 11, Div. 8, Title XII, R. S. All sections not carried here are repealed by the Code.

Chapter 12 of Div. 8, Title XII, relating to platting commission is substantially retained in § 142 of the Code, page 367.

(2) See note "Status of Hamlets" under § 1 of the Code.

(3) **Plat as a dedication.**—A plat duly made and recorded according to all the requirements of the statutes constitutes a statutory dedication of the property so platted, to public use. *Fulton v. Mehrenfeld*, 8 O. S. 440; *Wisby v. Bonte*, 19 O. S. 238; *Winslow v. Cincinnati*, 6 N. P. 47.

When all the statutory requirements have been complied with, no other or further act of acceptance on the part of the municipality is required. *Sullivan v. Columbus*, 12 Dec., 650; *Fulton v. Mehrenfeld*, 8 O. S. 440.

A plat, to operate as a dedication, must mark out grounds for use of

the public. A plat setting apart grounds marked "The A R. R. Depot," will not be a dedication either to the public or the railroad company. *Todd v. R. R. Co.*, 19 O. S. 514.

**Condition in dedication.**—A plat marking out sidewalk lines on the street dedicated does not bind the municipality to observe these lines in constructing sidewalks, although council has by a general resolution accepted the dedication, and council can fix the sidewalk line at a different place. *Cox v. Lancaster*, 24 C. C. 265; 2 C. C. (N. S.) 218 (aff'd, 69 O. S. 576).

**Defective plat not a statutory dedication.**—A plat not made according to the statutory requirements, or not acknowledged according to statute, does not operate as a statutory dedication. *Stephenson v. Leesburgh*, 33 O. S. 475; *Lockland v. Smiley*, 26 O. S. 94; *Doren v. Horton*, 1 Disney 401; *Ashley v. Toledo*, 13 C. C. 1; *Reynolds v. Newton*, 14 C. C. 433; *Satchell v. Doram*, 4 O. S. 542.

Such plat may be revoked at any time. *Lockland v. Smiley, supra.*

But a defective plat, though not valid as a statutory dedication, may show an intention to dedicate, and, if there is a proper acceptance, may go to make up a common law dedication. *Daiber v. Scott*, 3 C. C. 313.

**Common law dedication.**—See note under § 2650 R. S., re-enacted in § 28 of the Code, page 128.

**Presumption of correct plat;** when municipality has been legally established, see *Stephenson v. Leesburgh*, 33 O. S. 475.

**Scope of section.**—The statute gives authority to any person to make a plat of a certain division of

territory. It does not require that the territory shall be incorporated as a municipal corporation. *Walworth v. Collinwood*, 8 C. C. 477, 478.

The section does not give authority to enter upon lands to survey and plat an addition to a municipal corporation against the will of the tenant in possession. *Nigh v. Keifer*, 5 C. C. 1.

**Rights of vendee, after plat made.**—See *Doren v. Horton*, 1 *Disney*, 401; *Huber v. Gazley*, 18 O. 18; *Reynolds v. Newton*, 14 C. C. 433; *Ashley v. Toledo*, 13 C. C. 1 (*aff'd*, 59 O. S. 631); *Myers v. Toledo*, 18 C. C. 817.

**Sec. 2598 R. S. [What such plat shall contain.]** All the in-lots intended for sale shall be numbered in progressive numbers, or by the squares in which they are situated, and their precise length and width shall be stated on such plat or map; and all out-lots which do not exceed ten acres in size, shall in like manner be surveyed and numbered, and their precise length and width stated on the plat or map, together with any streets, alleys, or roads which divide or border on the same. [29 v. 350, § 2 S. & C. 1483.]

**Sec. 2599 R. S. [Corner-stone to be planted.]** The proprietor of the hamlet or village, at the time of surveying and laying it out, shall plant and fix, at the corner of the public ground, or a public lot, if any there be, and if there be none, then at the corner of one of the in-lots, and at the corner of each out-lot, a good and sufficient stone, of such size and dimensions, and in such manner, as the surveyor shall direct, for a corner from which to make future surveys; and the point or points where the same may be found shall be designated on the plat or map. [29 v. 350, § 3; S. & C. 1483.]

**Sec. 2600 R. S. [Plat to be acknowledged and recorded.]** After the plat or map is completed, it shall be certified by the surveyor, and acknowledged by the owner or owners before some officer authorized to take the acknowledgment of deeds, who shall certify his official act on the plat or map; and if any owner is a non-resident of the state, his agent, authorized by writing, may make such acknowledgment; and such plat or map, and if the execution is by agent, his written authority,



shall thereupon be recorded in the office of the county recorder.<sup>1</sup> [29 v. 350, § 4; S. & C. 1483.]

(1) **Recording plats.**—A plat operated as a dedication, though not recorded, where no statute required recording. *Williams v. Presbyterian Society*, 1 O. S. 478.

But now a plat not duly recorded

and acknowledged cannot operate as a statutory dedication. *Doren v. Horton*, 1 Disney, 401; *Ashley v. Toledo*, 13 C. C. 1; and see notes under preceding section.

**Sec. 2601 R. S.** [Plat of subdivisions; its acknowledgment and record; fee in corporation, except, etc.; plat to correspond with maps of platting commission; when to be approved by council.] A proprietor of lots or grounds in a municipal corporation, who subdivides or lays the same out for sale, shall cause to be made an accurate map or plat of such subdivision, describing with certainty all grounds laid out or granted for streets, alleys, ways, commons, or other public uses; also, all lots sold, or intended for sale, by progressive numbers, or by the squares in which they are situated, and the precise length and width of each lot sold, or intended for sale; which map or plat shall be subscribed by such proprietor, or his agent, duly authorized by writing, acknowledged before an officer authorized to take the acknowledgment of deeds, who shall certify the acknowledgment of the instrument, and recorded in the office of the recorder of the county; and thereupon the map or plat so recorded shall be deemed a sufficient conveyance to vest in the municipal corporation the fee of the parcel or parcels of land designated or intended for streets, alleys, ways, commons, or other public uses, to be held in the corporate name in trust to and for the uses and purposes in the instrument set forth and expressed, designated, or intended: provided, that no such map or plat of any addition within the limits of any municipal corporation, when there are no<sup>1</sup> record plats adopted by a platting commission or board of public works, shall be recorded until the engineer of the municipal corporation certifies that the streets, as laid down on the plats of such addition, correspond with those laid down on the recorded plats of the platting commission or board of public works, and when there are streets laid down in addition to those adopted by a platting commission or board of public works, or in any municipal corporation where no platting commission is or has been in existence, no such plat shall be recorded until the same shall have been approved by the council of such municipal corporation<sup>2</sup> [73 v. 60, § 6; (S. & C. 1483).]

(1) The word "no" was "on" in the original act of 1873 (73 O. L. 60).

(2) **Construction of former statutes** relating to recording, etc., of plats, see *Lebanon v. Warren Co.*, 9 O. 80; *Le Clercq v. Gallipolis*, 7 O. (1st pt.) 217; *Crippen v. Ohio University*, 12 O. 96; *Huber v. Gazley*, 18 O. 18; *McLaughlin v. Stevens*, 18 O. 94; *Langley v. Gallipolis*, 2 O. S. 107; *Satchell v. Doram*, 4 O. S. 542; *Bd. of Ed. v. Edison*, 18 O. S. 221; *Seegar v. Harrison*, 25 O. S. 14.

**Plat as a dedication.**—See notes under § 2597 R. S. *supra*.

**Sec. 2602 R. S.** [Penalty against making record contrary to this chapter.] Any county recorder who records such map or plat contrary to the provisions of this chapter, shall forfeit and pay any sum not more than five hundred dollars nor less than one hundred dollars, to be recovered with costs in a civil action, in the name and for the use of the county, by the prosecuting attorney. [73 v. 61, § 3.]

**Sec. 2603 R. S.** [Penalty for selling lots contrary to this chapter.] If a proprietor, or his agent or attorney, sells any lot or lots in any plan of subdivision of, or addition to the lots originally laid out in a municipal corporation, before a map or plat of such subdivision or addition shall have been recorded, as herein required, such proprietor, agent, or attorney shall forfeit and pay for each lot sold the sum of fifty dollars, to be recovered with costs, in a civil action, in the name and for the use of the municipal corporation, before any court of competent jurisdiction, at the suit of the solicitor or any citizen of the corporation. [29 v. 350, § 7; S. & C. 1483.]

**Sec. 2604 R. S.** [Fee in county, except, etc.] The plats or maps, other than those mentioned in section *two thousand six hundred and one*, shall be deemed in law a sufficient conveyance to vest the fee simple of all such parcels of land as are therein expressed, named, or intended for public use, in the county in which the hamlet or village is situated, for the uses and purposes therein named, expressed or intended, and for no other use or purpose whatever.<sup>1</sup> [29 v. 350, § 8; S. & C. 1484.]

(1) **Title to streets.**—The fee subdivision forming a village or addition to municipal corporation

**Character of municipality's title.**—The title, which a municipal corporation acquires, under § 2601, to streets dedicated by a proprietor who sub-divides lots for sale, is held for the use of the public for street purposes. *Callen v. Electric Light Co.*, 66 O. S. 166; *Keefe v. R. R. Co.*, 8 N. P. 466; *McLean v. Electric Light Co.*, 9 B. 65.

**Purpose of section,** has no relation to assessments. See *Gibson v. Cincinnati*, 8 N. P. 466.

**Effect of record of plat not properly approved,** see *Abraham v. Cincinnati*, 13 Dec. 619.

vests in the county, and the period vested is 21 years. *Walworth v. Collinwood*, 8 C. C. 477.

**Sec. 2605 R. S. [Penalty for neglect to plant corner-stone, etc.]**

If any person lays out a hamlet or village, or addition to a municipal corporation, and neglects to plant the corner-stones therein, or causes the same to be surveyed or platted in any other manner than that which is prescribed in this chapter, he shall forfeit and pay the sum of one hundred dollars and costs of suit, to be recovered in a civil action, in the name of the county treasurer, for the use of the county. [29 v. 350, § 9; S. & C. 1485.]

**Sec. 2606 R. S. [Penalty for disposing of lot before provisions of chapter complied with.]** If any person disposes of, or offers for sale, or leases for a time exceeding five years, any in-lot or out-lot, or any part of either, in any hamlet or village, whether incorporated or not, or in any addition to any municipal corporation, before the requisitions of this title are complied with, he shall forfeit and pay the sum of twenty-five dollars for each lot or part of lot so sold, or offered for sale, or leased, to be recovered, with costs, in a civil action, in the name of the county treasurer, for the use of the county.<sup>1</sup> [29 v. 350, § 10; S. & C. 1486.]

(1) **Contract for sale is valid,** according to terms of the statute. although the village lot has not *Strong v. Darling et al.*, 9 O. 201. been surveyed, platted, and recorded

**Sec. 2607 R. S. [Directors to lay out village where county seat located: how governed; penalties.]** The directors appointed by the court of common pleas, to lay out a village, where a seat of justice has been located on lands upon which no municipal corporation is situated, shall be governed by the provisions of this chapter, and liable to the same penalties prescribed in section *two thousand six hundred and two*. [29 v. 350, § 11; S. & C. 1486.]

## 2. VACATING PLATS.<sup>1</sup>

**Sec. 2608 R. S. [Vacation of plat.]** The court of common pleas, upon the application of two-thirds of the proprietors thereof, shall have power to alter or vacate the plat of any municipal corporation, addition thereto, or parts thereof,



within the county, as hereinafter specified. [38 v. 32, § 1; S. & C. 1488.]

(1) The sections carried here the sections of this subdivision are formed subdivision 2, Chap. 11, repealed.  
Div. 8, Title XII., R. S. None of

**Sec. 2609 R. S.** [Application for vacating or altering plat; notice.] All applications for ~~vacating~~ or altering any plat, addition, or part thereof, shall be ~~by~~ petition in writing, filed with the clerk of the court of common pleas, and the applicant or applicants shall give thirty days' notice thereof by publication in some newspaper printed in the county and of general circulation therein; which notice shall set forth briefly the part or parts of the plat or addition to be vacated. [1886, February 25: 83 v. 24; Rev. Stat. 1880; 38 v. 32, § 4; (S. & C. 1488).]

**Sec. 2610 R. S.** [When court may alter or vacate plat; any person feeling interested may be made party defendant.] If the petitioners produce to the court satisfactory evidence that the notice required by the preceding section has been given, and that two-thirds of all the persons owning lots or parts thereof in the corporation or the addition, as the case may be, or their authorized agents or attorneys, have made application to have the whole or a part of such corporation or addition, altered or vacated, the court shall, in its discretion, proceed to alter or vacate such corporation or addition, or any part of either, as the case may be; and the proceedings shall be recorded by the clerk, in the records of the court, a copy of which record shall be made and certified under the seal of the court, by the clerk thereof, and shall, by the parties applying for such vacation or alteration, within thirty days from the rising of the court, be deposited with the recorder of the county, who shall record the same; provided, that the vacation of any municipal corporation or addition, or part thereof, shall not vacate any part of a state or county road. At the term at which the notice shall be given, as is provided for in section *twenty-six hundred and nine*, or at any subsequent term during the pendency of the application, any person feeling interested in the proceedings, may, upon motion, be made a party defendant to the application; in which case, upon final hearing, the party succeeding shall have judgment against the other, for the costs of the proceedings, and execution may issue therefor as in other cases. [29 v. 352, §§ 3, 4; S. & C. 1487.]

**Sec. 2611 R. S.** [Commons may be changed into streets: when and how.] On application made, and notice given according to

the provisions of this subdivision, the court of common pleas shall have power to change any commons that may be included in the plat of any municipal corporation into streets, and to cause such change to be recorded as is provided by section *two thousand six hundred and ten*. [29 v. 352, § 6; S. & C. 1487.]

**Sec. 2612 R. S.** [Clerk's fees.] The clerk of the court shall be entitled, for recording a plat required to be recorded under the provisions of this chapter and for other services required of him, the same fees as are allowed to him for similar services by the provisions regulating his fees. [29 v. 352, § 5; 26 v. 18, § 5; S. & C. 1487.]

**Sec. 2613 R. S.** [Application for vacation and assessment of damages.] If the court is of opinion that any person owning any lot in such plat, addition, or parts thereof proposed to be vacated or altered, not assenting thereto, will sustain damage thereby, it may proceed to hear proof in reference thereto, and may render judgment against the petitioners for such damages as it may think proper and just, and the same shall be assessed by the court against the petitioners ratably, according to the value of the property owned by the petitioners, as the same stands taxed on the tax-list of said county; and when necessary, the court shall appoint a guardian ad litem for all minors or persons of insane mind, who may be interested in the premises; and the judgment of the court vacating such plat, addition, or parts thereof, shall be conditional upon the payment of the damages thus assessed. [38 v. 32, §§ 2, 3; S. & C. 1488.]

**Sec. 2614 R. S.** [Changing of incorporate town or addition.] Any person or persons owning, either jointly or severally, and either in their own right or in trust, and having the legal title to, any land laid out in town lots, not within the limits or subject to the control of any municipal corporation, may change such lots and the streets and alleys bounding the same, by making, acknowledging and having recorded, as in this chapter provided, a new plat of such land, and having the proper transfers made in the office of the county auditor: provided, that no such change shall be made if it affects injuriously any lots on the streets or alleys,<sup>1</sup> or within the plat so changed, unless all the owners of the lots so affected are parties joining in making the change, or they give their consent in writing on the new plat, and the same be recorded therewith; and any change of a town plat made as in this section provided shall

have the same force and effect as if made by the judgment of a court having jurisdiction thereof. [76 v. 88, §§ 1, 2.]

(1) **Change must not affect streets.**—Owner may change lots provided no alterations are made in streets or alleys. *Huling v. Huffman*, 26 B. 73 *edit*; if streets or alleys are changed, proceedings in court must be had. *Ib.*

**Sec. 2614a R. S.** [Proceedings to vacate lots not within a municipal corporation; duty of county auditor and recorder.] Any person or persons owning, either jointly or severally, and either in their own right or in trust, and having the legal title to any land laid out in town lots, or to any whole block or blocks of lots in any land laid out in town lots, and not within the limits or under the control of any municipal corporation, may vacate said lots or block or blocks of lots upon giving notice of his, her or their intention so to do, for two weeks in some newspaper published, and of general circulation, in the county where said land lies, and if any of said lots have been sold, personal written notice to the owner or owners of said lots so sold, and if no notice of an injunction granted against such vacation is served upon the auditor of the county where said lands lie, or any notice of dissent from said vacation, by the owners of any of said lots, within ten days after the completion of said notice, the said auditor shall and he is hereby authorized and required to make all necessary changes and transfers in and upon his duplicate after said ten days from the time of the completion of said notice; the proof of which shall be furnished said auditor, and he shall give to the party or parties at whose instance such vacation is made, a certificate stating that such lots or block or blocks of lots have been vacated, upon the presentation of which to the recorder of said county, he shall write upon such plat of lots, block or blocks as they appear on the plat of such lots the word "vacated," and said vacation shall have the same effect as if made by the judgment of a court having jurisdiction thereof. The said auditor and recorder shall be entitled to such fees for their services under this section as they are entitled by law in like cases, which shall be paid by the party or parties making such vacation. [1883, April 18; 80 v. 180.]

### 3. REVISION OF PLATS.<sup>1</sup>

**Sec. 2615 R. S.** [Who shall revise and re-number lots.] Where the lots of any municipal corporation are not numbered consecutively upon the original plat thereof, and the plats



of additions thereto, or subdivisions thereof, it shall be lawful for the auditor and recorder of the county in which such municipal corporation may be situate, in conjunction with some person to be appointed by the mayor of such municipal corporation, to make a revision of the numbers of all the in-lots and out-lots of such municipal corporation, as the same stand upon record, and to number anew all the lots, so that the in-lots shall have but one consecutive series of numbers, beginning with number one; and the out-lots shall have but one similar series of numbers, also beginning with number one. [46 v. 34, § 1; S. & C. 1489.]

(1) None of the sections of this subdivision are repealed by the Code.

**Sec. 2616 R. S. [Mode of re-numbering, etc.]** Such auditor and recorder, with their associate, to be appointed as aforesaid, shall make a schedule of all the in-lots of any such municipal corporation, beginning with the original plat thereof, setting down the lots in the same order of their numbers, and placing opposite thereto the new numbers which shall be assigned to the respective lots, following in the same manner with the plats of addition and subdivision, according to their priority in date of record, so that the first column shall contain the old numbers of the in-lots in their consecutive order and the second column shall exhibit opposite to such numbers respectively, the new numbers assigned to each of said lots; and in the same manner, they shall make a schedule of the out-lots; such schedule shall accurately and distinctly indicate the plat in which such in-lot or out-lot originally stands upon record; and it shall be the duty of the auditor and recorder to place such schedule on record in their respective offices. [46 v. 34, § 2; S. & C. 1489.]

**Sec. 2617 R. S. [Shall be assessed and legally known by their new numbers.]** When the revision and re-numbering of the lots in any such municipal corporation have been made, and the schedule thereof recorded, as provided in the preceding section, the lots shall be assessed and entered upon the tax-list for taxation, according to their new numbers; and in all the operations of the assessment and collection of taxes they shall be lawfully known and designated by the new numbers given to them under the authority of this subdivision; and all conveyances of the same made by the new numbers shall be sufficient to pass the title. [46 v. 34, § 3; S. & C. 1490.]

**Sec. 2618 R. S. [How expenses of re-numbering paid.]** When such revision and re-numbering are done at the request of the corporate authority, of any such municipal corporation, the expenses shall be paid by such corporation; but the county commissioners of any county in which any unincorporated hamlet or village may be situated, shall have authority to direct the auditor and recorder to make such revision and re-numbering of such unincorporated hamlet or village, and cause the expenses thereof to be paid out of the county treasury; and they may direct the auditor and recorder to make such revision and re-numbering of an incorporated hamlet or village, if the commissioners are of opinion that such revision and re-numbering are necessary for convenience and efficiency in taxation. [46 v. 34, § 4; S. & C. 1490.]

**Sec. 2619 R. S. [How additions or subdivisions are to be numbered after such revision.]** After the revision is made and recorded, as hereinbefore provided, every person who lays off lots as an addition to such municipal corporation, or who makes a subdivision of lots therein, shall number the lots so divided upon his plat in regular consecutive numbers, commencing with the next number after the highest number of such in-lots or out-lots, as the same shall be ascertained by the recorder from a careful examination of the original records and revisions. [46 v. 34, § 5; S. & C. 1490.]

**Sec. 2620 R. S. [Compensation.]** The auditor, recorder, and their associate, shall each receive the sum of two dollars per day for their services under this subdivision. [46 v. 34, § 6; S. & C. 1490.]

#### 4. LOST OR DESTROYED RECORDS.<sup>1</sup>

**Sec. 2621 R. S. [Application to supply lost or destroyed records.]** It shall be lawful for any ten persons, their agents or attorneys, owning or being interested in any lots of land in any municipal corporation, where the original plat, or any addition thereto, has been recorded in the records of the county in which such municipal corporation is situated, and the records and original plat thereof have been lost or destroyed, to make application in writing to the county commissioners of such county to have the records of the plat or plats so lost or destroyed supplied, which application shall be filed with the auditor of such county. [70 v. 65, § 1.]

(1) None of the provisions of this subdivision are repealed by the Code.

**Sec. 2622 R. S. [Publication of notice of such application.]** Upon the filing of the application, it shall be the duty of the auditor of such county to give notice, by publication for two consecutive weeks in some newspaper published and of general circulation in the county, or if there be no newspaper published in such county, then in some newspaper of general circulation therein, of the filing of the application as aforesaid, and also to notify the county commissioners thereof. [70 v. 65, § 2.]

**Sec. 2623 R. S. [County commissioners to appoint surveyor, etc.; duties of surveyor.]** It shall be the duty of the commissioners of such county, upon the filing of the application, and the giving of the notice thereof, as aforesaid, forthwith to employ a competent surveyor, who, after being duly sworn to well and faithfully discharge the duties assigned him, shall proceed to re-plat such municipal corporation according to the original plan or plat of the same; and for the purpose of enabling him more easily to find the lines and corners of streets, lanes, alleys, and lots, such surveyor may call and examine witnesses, under oath or otherwise, and when he shall have fully performed all the duties assigned him, and made a plat of such municipal corporation, he shall make and attach his certificate to such plat that the same is a correct copy of the original plat of such municipal corporation, as he verily believes, together with the costs and expenses of making the same, and forthwith file it with the auditor of the county. [70 v. 65, § 3.]

**Sec. 2624 R. S. [Record of plat and certificate.]** Upon the filing of the plat and certificate by the surveyor, the commissioners of the county shall cause the same to be recorded in the office of the recorder of the county; and when the plat and certificate shall have been recorded, the record, or a copy thereof, certified to by the recorder, shall be prima facie evidence of the plat of the municipal corporation, in all the courts of this state. [70 v. 66, § 4.]

**Sec. 2625 R. S. [Record of proceedings by county auditor.]** It shall be the duty of the auditor of such county to keep a full and complete record of the proceedings, as aforesaid, in the commissioners' journal, and for which he shall receive such compensation as is allowed by law for similar services; and the surveyor and recorder aforesaid shall receive and be paid out of the county fund of such county, on the order of the county auditor, for their services, such fees as are allowed by law for similar work. [70 v. 65, § 5.]



## XVI

## STREETS.

## 1. STREETS ON STATE LANDS.

**Sec. 625 R. S.** [No streets, alleys, or roads shall be laid out through lands belonging to benevolent institutions.] No streets, alleys, or roads, shall be laid out, or established through or over the lands belonging to any of the public institutions of the state, without the special permission of the General Assembly. [49 v. 110 (119), § 1; S. & C. 181.]

## 2. COUNTY BRIDGES AND ROADS IN MUNICIPAL LIMITS.

**Sec. 860 R. S.** [Commissioners shall construct and repair bridges, except, etc.; demand of portion of bridge tax in Hamilton Co.] The commissioners shall construct and keep in repair all necessary bridges over streams and public canals on all state and county roads, free turnpikes, improved roads, abandoned turnpikes and plank roads in common public use, except only such bridges as are wholly in such cities and villages having by law the right to demand, and do demand and receive part of the bridge fund levied upon property within the same; and when they do not demand and receive said portion of bridge tax the commissioners shall construct and keep in repair all bridges in such cities and villages. Provided, that in all cases, except counties containing a city of the first grade of the first class, the granting of the demand, made by any city or village for its portion of the bridge tax, shall be optional with the said board of commissioners.<sup>1</sup> [91 v. 19; 83 v. 29; Rev. Stat. 1880; 69 v. 61, § 1; 36 v. 51, § 1; (S. & C. 193).]

(1) **Bridges in municipal limits** — *Rights of county.* — County commissioners cannot recover for damages to bridge in municipality which receives part of the bridge

fund. *Commissioners v. Ry. Co.*, 45 O. S. 401. See further *Perry Co. v. R. R. Co.*, 43 O. S. 451.

County cannot by mandamus compel municipality to assume con-

trol of bridge. *State ex rel. Commissioners v. Cincinnati*, 4 N. P. 313.

**Duty and liability of county.**—County not required to make or repair bridges in municipalities having right to part of bridge fund. *State ex rel. Commissioners v. Cincinnati*, 4 N. P. 313. See further, note (2) to § 28 of the Code. As to duty where municipality receives no part of bridge fund, see *Piqua v. Geist*, 59 O. S. 163; *Newark v. McDowell*, 16 C. C. 556, and see § 4938 R. S. *infra*.

**Rights of municipality as to control over such bridges**, see note (2) under § 28 of the Code

**Duty and liability of municipality.**—As to the liability of municipality for injuries on such bridges, see note "Where duty of county to repair," page 118.

**Construction of section.**—In connection with § 2824 R. S. (relating to tax levies for bridge purposes), see *State ex rel. v. Commissioners*, 4 N. P. 343.

In connection with § 4938 R. S., see *Commissioners v. Ry. Co.*, 45 O. S. 401.

**Township roads in municipal limits**, improvement of, see 97 O. L. 94, 550, and amendments; 98 O. L. 155, 292; R. S. §§ 4686-1 to 4686-25 inclusive.

**Duties of Road Superintendents**, see 98 O. L. 335; §§ 4717, 4715a, 4716, 4729, 4730 R. S.

**Sec. 4938 R. S. [Commissioners must build bridges in certain cities and villages.]** The commissioners of the several counties shall cause to be constructed and kept in repair, in the manner prescribed by law all necessary bridges in villages and cities not having the right to demand and receive any portion of the bridge fund levied upon property within such corporations, on all state and county roads, free turnpikes, improved roads, transferred and abandoned turnpikes and plankroads, which are of general and public utility, running into or through any such village or city.<sup>1</sup> [69 v. 61, § 1.]

(1) See notes to § 860 R. S. *supra*.

**Scope of power.**—Bridge constructed must not interfere with navigation. *Hickok v. Hine*, 23 O. S. 523.

Whether bridge is necessary in particular case is to be determined by the commissioners and the courts will not interfere with their exercise of discretion. *State ex rel. v. Commissioners*, 49 O. S. 301.

**Sec. 2824 R. S. [Levy of taxes for county road and bridge purposes.]** The commissioners, at their March or June sessions, annually, may levy on each dollar of valuation of taxable property within their county, for road and bridge purposes, as follows; In a county where the valuation of taxable property exceeds eighty millions and does not exceed one hundred and twenty millions dollars, five-tenths of a mill; where the amount exceeds fifty millions and does not exceed eighty millions, seven-tenths of a mill; where the amount exceeds twenty mil-

lions and does not exceed fifty millions of dollars, one mill and one-tenth; where the amount exceeds ten millions and does not exceed twenty millions of dollars, one mill and five-tenths; where the amount exceeds five millions and does not exceed ten millions of dollars, three mills; and where the amount is less than five millions of dollars, five mills and five-tenths; and of the tax so levied, the commissioners shall set apart such portion, as they may deem proper, to be applied to the building and repair of bridges, which portion so set apart shall be called a bridge fund, and shall be entered on the duplicate in a separate column, and shall be collected in money, and expended, except as may be otherwise provided by law, under the directions of the commissioners in building bridges and culverts, or in repairing the same;

[**Hamilton county.**] provided, that in any county containing a city of the first grade of the first class, where the valuation of taxable property exceeds two hundred millions of dollars, the commissioners of said county may levy on each dollar of valuation of taxable property within said county, for bridge purposes exclusively, not to exceed one-half of a mill, which shall be collected in money and placed by the auditor to the credit of the bridge fund of the county, and the same shall be expended by the commissioners in building bridges and culverts, and in repairing and making fills and approaches to the same in the townships outside of the corporate limits of said city, and for no other purpose whatever;

[**Payment to Cincinnati.**] except that a portion of said fund collected in the said county, amounting to not less than a levy of one-sixth of a mill on each dollar of valuation of the taxable property within said county in all cases where the board of legislation of said city of the first grade of the first class shall demand it, shall be paid into the city treasury of said city and shall be expended by the board of administration of said city, for the purpose of building and repairing of bridges within the corporate limits of the same;

[**Special tax to restore important bridge.**] provided, further, that in case an important bridge belonging to or maintained by any county has been or shall be destroyed or become dangerous to public travel by decay or otherwise, and the restoration thereof is deemed necessary for public accommodation, the commissioners may levy a special tax for that purpose, not exceeding one mill and five-tenths, the proceeds of which shall be applied solely to such restoration;



[**Anticipation thereof.**] and the commissioners may anticipate the collection of such special tax by borrowing any sum not exceeding the amount so specially levied or to be levied, at any rate of interest not exceeding six percentum, and issue notes or bonds therefor, payable upon the collection of such special tax;

[**Cleveland and cities of second class.**] provided, further, that in all cities of the second grade of the first class, and all cities of the second class one-half of the proportion of said bridge fund collected upon the property within said cities, in all cases where the city council shall demand it, shall be paid into the city treasury, and shall be expended by such city for the purpose of building and repairing bridges;

[**Marietta.**] and provided further, that in cities having at the last federal census, or at any subsequent federal census a population of 8,273, the whole of the proportion of said bridge fund collected upon the property within said city shall upon demand of the council of said city therefor be paid into the treasury of said city, and shall be expended by said city for the purpose of building and maintaining bridges therein;

[**Montgomery county.**] provided further, that the commissioners of Montgomery county shall levy not exceeding one mill and six-tenths for road and bridge purposes, and that said levy shall only be on property subject to taxation outside the city of Dayton, and the proceeds of such levy shall be applied exclusively to roads and bridges outside of said city;

[**Dayton.**] and the council of said city may annually levy on the taxable property within the same, for bridge purposes, a tax of one mill and one-tenth in addition to the total aggregate of taxation now authorized by said council, to be expended for building and repairing bridges within said city;

[**Trumbull county.**] and provided further, that the commissioners of Trumbull county may levy not to exceed the rate allowed by law for road and bridge purposes, and that said levy shall only be on property subject to taxation outside of the city of Warren, and the proceeds of such levy shall be applied to road and bridge purposes exclusively outside of said city;

[**Warren.**] and the council of said city may annually levy on each dollar of valuation of taxable property within said city for bridge purposes, one and five-tenths of a mill, in addition to the total aggregate of taxation now or hereafter authorized by law, to be expended for building and repairing bridges within said city; except that in the event that the commissioners

of the county transfer from the road and bridge fund to some other fund, the whole or some part of the six-tenths of a mill as now allowed by law, the council of said city shall make a like transfer to the same county fund; and the council of said city may anticipate the whole or some part of the annual levy for said purposes for the period of ten years or less, by borrowing a sum, not exceeding twenty thousand dollars, at a rate of interest not exceeding six per centum, and issue bonds therefor, payable on the collection of said tax.

[**Expiration of proviso.**] Said last proviso relating to the city of Warren in said Trumbull county shall expire by limitation after twelve years from the time it becomes a law, and said city shall again become a part of the county for bridge purposes under the general law;

[**Holmes county.**] provided further, that the commissioners of Holmes county at their March or June sessions shall levy on all the taxable property of said county, the amount now authorized by law for road and bridge purposes to be used on roads and bridges, and the commissioners of Holmes county may turn over such portion of the taxes so raised for roads and bridges on the taxable property in said incorporated village of Millersburg, said county, to the council of said incorporated village for road and bridge purposes as they may deem proper, and the commissioners of said county on the demand of said council of the incorporated village of Millersburg shall turn over to the treasury of said village the pro rata share of the taxes levied in 1899.<sup>1</sup> [94 v. 172; 91 v. 12, 128, 196; 89 v. 272; 88 v. 508; 84 v. 224; R. S. of 1880; 74 v. 92, § 2; 73 v. 11, §§ 1, 2; (S. & S. 666; S. & C. 1317).]

(1) **Rights of municipalities.**— Co. v. R. R. Co., 43 O. S. 451.

See State *ex rel.* v. Commissioners,  
4 N. P. 343.

Section cited, State *ex rel.* v.  
Pohling, 1 C. C. at 490.

Use of fund received, see Perry

**Sec. 4825 R. S.** [When road may be extended to village.]

When a free turnpike road in progress of construction terminates within one mile, by way of a public road, of any such village, the council of such village shall have the same power to levy a tax and issue bonds to aid in the construction of such free turnpike road that it would have if the road terminated in the village; and if the county commissioners having in charge the construction of such road accept such bonds, such free turn-

pike road shall be deemed to be extended, by way of the public road before mentioned, to the corporate limits of the village; and the commissioners shall make and publish an order to that effect, and thereupon the commissioners shall improve such extension of such free turnpike road, in the same manner as the other parts of the same. [65 v. 180, § 1; S. & S. 686.]

**Sec. 4850 R. S. [Cities and villages may assist in constructing improved road.]** When any road to be improved under and by virtue of this chapter<sup>1</sup> begins or terminates in a city or village, the corporate authorities thereof may, upon the recommendation of the county commissioners, if they deem the same expedient, agree to pay in the bonds of such city or village, in the manner and proportions described in sections *forty-eight hundred and forty-six*,<sup>2</sup> in addition to any amount that may be assessed<sup>3</sup> upon the real property within such corporation by virtue of the provisions of this chapter, an amount not exceeding one-fifth of the entire cost of the road; but the entire tax to be imposed for road purposes, by virtue of this section, shall not in any year exceed five mills on the dollar of the taxable property in the corporation. (64 v. 80, § 9.) [1880, March 9; 77 v. 55, 56; Rev. Stat. 1880; (S. & S. 672).]

(1) **Chapter** referred to here is chapter relating to Two Mile Assessment Pikes.

(2) **Section referred to.**—§ 4846 R. S. gives commissioners power to issue bonds to meet expense of road improvements.

(3) **What lots and lands may be assessed.**—See Commissioners v. Young, 36 O. S. 288.

Section cited, Lewis v. Laylin, 46 O. S. 663, 673.

**Sec. 4851 R. S. [Cities in adjoining county may aid.]** When it is desirable or expedient to continue any road contemplated under this chapter, into or through an adjoining county, the city council of any city of the first or second class may, upon the application and recommendation of the county commissioners of such county, if the council deem the same promotive of the general interests of such city, aid in the construction of the road to an extent not exceeding one-fifth of its cost, the payment of the same to be provided for in the manner and proportions described in section *forty-eight hundred and forty-six*. [64 v. 80, § 10; S. & S. 672.]

**Sec. 1448c R. S. [Meetings of township trustees, road superintendents and street commissioners with county commissioners; compensation for attending.]** The board of county commissioners of each county shall, one day in each year, call a meeting at the county seat and notify each township trustee holding office in said county and each road superintendent as herein provided for, and each street commissioner employed



by any municipality, to attend said meeting for the purpose of receiving instruction and direction as to the care and maintenance of the public roads. Each township trustee and road superintendent and street commissioner attending said meeting shall receive one dollar and fifty cents, and no more, for each day of actual attendance, the township trustees and road superintendents to be paid out of the general fund of their townships, and the street commissioner to be paid out of the general fund of the municipality. [1906, April 16, 98 v. 332.]

**Sec. 1448d R. S. [Contracts for repair or maintenance of public roads or streets; notice.]** The commissioners of any county, the trustees of any township or the board of public service of any municipality may contract with any person, firm or corporation for the repair or maintenance of any public road or street within their respective political subdivisions. Such contracts may be for furnishing material and repairing or for any purpose necessary to maintain any street, road or roads. Such contract shall not be made until an advertisement containing plans and specifications be published two weeks in a newspaper of general circulation published within the political subdivision wherein such road is situate or in a paper of general circulation within the county and posting copies of same in two public places, for two weeks, near where the road is situate. [1906, April 16, 98 v. 332.]

**Sec. 2830 R. S. [Payment of road tax; expenditure of road fund.]** Any person charged with a road tax shall pay the same in money to the county treasurer in the same manner as other taxes are collected and paid. All road taxes paid to or collected by the county treasurer shall be paid over to the treasurer of the township or municipal corporation from which the same were collected, and shall be expended on the public roads and in building and repairing bridges in the township and municipal corporation from which the taxes were collected under the direction of the trustees of the proper township or council of such municipal corporation; and all funds heretofore levied for road purposes and not expended, shall be expended by the trustees of the township or council of the municipal corporation from which the same were collected as other taxes collected under the provisions of this title. [1906, April 16, 98 v. 333; 77 v. 184; 74 v. 92.]

**Sec. 4747 R. S. [Roads on state or township lines.]** A road superintendent of a road district bordering on the state line between Ohio and adjoining state may, when a public highway has been located upon such state line in accordance with and under the provisions of the laws of the state of Ohio, apply the labor of his district upon said road, in the same manner as on roads located within the boundaries of the state; and in case any public road is or may be established as a part

of the line or boundary of any township or municipal corporation, the trustees of such adjoining townships, and council of such corporations, as the case may be, shall meet at some convenient place as soon after the first Monday of March as convenient, and apportion such road between the townships, or township and corporation, as justice and equity may require, and the trustees of the respective townships, and council of the corporation, shall cause the road to be opened and improved accordingly, and shall thereafter cause their respective portions to be worked and kept in proper repair. [1906, April 16, 98 v. 339; 94 v. 184; 65 v. 14.]

**Sec. 4906 R. S. [Parts of roads in cities and villages to be repaired.]** The commissioners shall keep in repair such portions of such roads<sup>1</sup> within their respective counties as have since their completion been included, or may hereafter be included, within the corporate limits of any city or village in such counties, to points therein where the sidewalks have been curbed and guttered, and no further. [75 v. 32, § 2.]

(1) **Such roads** refers to "Improved Roads" defined in § 4876 R.S.

### 3. BRIDGE, TURNPIKE AND AVENUE COMPANIES.

**Sec. 3537. [Powers of bridge companies.]** A company incorporated to construct a bridge over any stream of water in this state shall either own the bank on each side of the stream where it is proposed to erect its bridge, or obtain the consent of the owner or owners thereof, in writing, to occupy the same; it may purchase, or appropriate in the manner provided by law, and hold, such real estate as will be required for the site of the bridge, and suitable avenues or approaches leading thereto, may use so much of any public street, road, or avenue as is necessary for landings and abutments, and may appropriate in the manner provided by law any rights or franchises necessary in the construction of the bridge; and the provisions of section thirty-four hundred and ninety-two shall be applicable to such companies. [69 v. 185, § 55; 53 v. 180, § 1; S. & C. 338.]

**Sec. 3540. [May make and enforce regulations.]** All bridge companies and owners are invested with full power and authority to make and enforce any rule or regulation deemed necessary or requisite to preserve and protect their property and collect their tolls, and may prevent any person from crossing any bridge owned by them on foot, or by riding, or driving any team or vehicle, or from driving any stock thereon, who fails to pay the regular fare when demanded; and the police

or watchman of any such bridge shall have all the power and authority -of -policemen of cities, and may arrest any person who violates the law, or the rules of the company or person owning the bridge, without warrant, at or upon such bridge, and take him before the proper civil authority to be dealt with according to law. [64 v. 128, § 5; S. & S. 57.]

**Sec. 3542. [Further powers of Ohio river bridge companies.]**

Such company may purchase, or appropriate in the manner provided by law, and hold such real estate as, in the opinion of its directors, will be required for the site of the bridge, and of suitable avenues or approaches leading thereto, and may locate the same on, or construct the same over, any public street, road, avenue, or alley; provided, that in constructing the same over any public street, road, avenue or alley, the said bridge shall be constructed at such height as not to interfere with travel passing on, over or along the same; and provided further, that no pier, or other obstruction, shall be constructed or built upon such street, road, avenue or alley, without the consent of the municipal or other authorities having charge or control of the same. And the company shall be responsible for injuries done to private property, adjacent or near to such bridge, by its elevation and construction, which may be recovered in a civil action brought by the owner, at any time within two years from the completion thereof.<sup>1</sup> [1889, February 8: 86 v. 25; Rev. Stat. 1880; 65 v. 55, § 5; (S. & S. 203).].

(1) **Ohio River bridge companies.**—By Section 3541 R. S. a company organized to construct a bridge over the Ohio River is au-

thorized to construct and maintain such bridge with suitable avenues and approaches leading thereto.

**Sec. 3482 R. S. [Repair of roads within municipalities.]** If a company<sup>1</sup> fail to keep any part of its road within the limits of a municipal corporation in repair for five days successively, the proper authority of such municipal corporation may pass a resolution requiring such company to repair the same within ten days after the service of a copy of such resolution on the gate-keeper nearest such municipal corporation, and the company shall declare its intention to abandon or repair the same; in case of a failure or refusal so to do within thirty days, or in case of a failure or refusal to repair in ninety days, the municipal corporation may file a complaint in writing, with a copy of the resolution, in the court of common pleas of the county, describing the portion of the road required to be repaired, and



the court, or any judge thereof, shall appoint two disinterested persons as inspectors, who shall review the portion of the road complained of, and return their finding thereon, under oath, to the court, within ten days; and if they find the complaint to be true, such portion of the road shall be declared abandoned by the company, and the municipal corporation may improve or repair the same, and assess and collect the costs of such improvement or repairs in the same way as is provided by law in relation to the improvement of streets.<sup>2</sup> [51 v. 464, § 1; S. & C. 333.]

(1) **Company**, refers to turnpike or plank road company. (§ 3472 R. S.) (2) See *Madisonville v. Tp. Co.*, 17 B. 30.

**Sec. 3483 R. S. [Proceedings to enforce repair.]** Notice of the complaint, and of the appointment and time of meeting of the inspectors, shall be served on the president or other officer of the company, or at its principal office, five days before the meeting of the inspectors; and if such service be made by any person other than the sheriff, it shall be verified by the oath of the person making the same; no toll shall be received at the gates for the portion of the road so declared abandoned; and if the keeper of any gate demand and receive toll for the same, he shall be liable to pay the sum of five dollars to the party injured, to be recovered by civil action before any justice of the peace having jurisdiction; [and] the costs of the proceeding on the complaint shall be paid by the company, if the action be sustained, but if not sustained they shall be paid by the municipal corporation, and execution shall issue therefor as in other cases. [51 v. 464, § 2; S. & C. 334.]

**Sec. 3491 R. S. [When municipal limits are extended beyond a toll-gate.]**<sup>1</sup> No company shall hereafter erect a toll-gate and collect tolls within the limits of any city or village, or within eighty rods of such limits; and where by the creation of a village, or the extension of the limits of a city or village, a toll-gate is brought within such limits, or within eighty rods thereof, the company shall remove the toll-gate to a point on its road not nearer to such limits than eighty rods, and so much of its road as is included within the limits of such city or village shall become a public street, and be kept in repair as other public streets, but no toll shall be taken thereon; <sup>2</sup> but compensation shall be made to the company for the damages it will sustain by reason of such removal of its toll-gate, and surrender of

such part of its road, and if the company and the proper authorities of the city or village do not agree thereon, the damages shall be ascertained in proceedings which the municipal authorities shall commence, to appropriate such property to the use aforesaid, in the manner provided by law for the appropriation of property by municipal corporations, or, in default of such agreement, or the institution of such appropriation proceedings, the company, at any time after the removal of the toll-gate, may recover the same from the city or village, by civil action.<sup>3</sup> [66 v. 36, § 1; 75 v. 90, § 34; (S. & S. 841; S. & C. 339).]

(1) **Other provisions.** — Power of council when turnpike comes within municipal limits, see § 2643 R. S. *et seq.*, page 123.

(2) **Rights of turnpike company.** — See notes under § 2643 R. S., page 123, and under § 2648 R. S., page 126.

(3) **Condemnation.** — A suit under this section by turnpike company, is in the nature of a condemnation. Tp. Co. v. Mt. Healthy, 66 O. S. 660 (unreported).

Municipality cannot condemn less than the whole of the turnpike ly-

ing within its limits. C. & W. Tp. Co. v. Cincinnati, 2 B. 126.

Municipality does not have right to lay water and sewer pipes under surface of turnpike, without condemning. C. & A. Tp. Co. v. Avondale, 17 B. 294.

Municipality may be mandamusd at suit of one traveling over pike, to commence appropriation proceedings. Gates v. Tp. Co. 4 N. P. 235. But injunction will not lie to prevent collection of tolls. *Ib.*

As to method of ascertaining damages in such condemnation, see note under § 2643 R. S., page 123.

**Sec. 3492 R. S.** [May sell bridge or road in such limits to city or village.] A company, any part of whose road or bridge is, or hereafter becomes, embraced within the corporate limits of a city or village may contract with the proper authorities of such city or village, or of the township or county in which the same is situate, for the disposal, release, and abandonment of such part of its road or bridge, for such compensation and upon such terms as may be agreed upon between the company and such authorities; and any such contract heretofore made shall be as good and valid as if made under and by virtue of this section.<sup>1</sup> [53 v. 180, § 1; S. & C. 338.]

(1) Section cited. State *ex rel.* v. Extension Lower River Road, 21 C. C. 662, 667.

**Sec. 3825 R. S.** [Avenue companies in certain counties; when consent of authorities necessary.] When in laying out any such

avenue<sup>1</sup> it becomes necessary to run through or along the line of any village, the board of directors of the avenue company shall obtain the consent of the council of such village to the laying out of such avenue through or along the territory over which they have supervision or control. [53 v. 46, § 4; S. & C. 343.]

(1) **Avenues referred to.**— Sections carried here are a part of Chap. 17, Title II, of Part II, of Bates' Revised Statutes. The avenues referred to are those constructed by avenue companies authorized to construct such thoroughfares in counties containing not less than one hundred thousand inhabitants.

**Sec. 3826 R. S. [Authorities may surrender roads to company.]** If, on application being made to the council of a village, they are of opinion that the public good demands the laying out of such avenue, they may give their written consent to the laying out and construction of the same, which shall have the force and effect of a full and complete release of all authority over the avenue within their corporate jurisdiction, and the directors may lay out and construct the avenue through the territory of such village, and control the same in all respects as though the village did not exist. [53 v. 46, § 5; S. & C. 343.]

**Sec. 3826a R. S. [Power to condemn avenues belonging to avenue companies within corporate limits.]** Where avenue companies have been or may hereafter be organized, and have constructed and operated, or may hereafter construct and operate an avenue or avenues in a county containing a city of the first grade of the first class, the board of public improvements of such city of the first grade of the first class, may, by resolution, declare it essential or necessary to the interest of said city that so much of any such avenue as may be within the corporate limits of the city should belong to the city for the purpose of a public street; and thereupon if the company owning such avenue and the board of public improvements of the city are unable to agree upon the amount of compensation to be paid for so much of said avenue as lies within the city, the board of public improvements of such city and the company owning such avenue may submit the question of the amount to be paid for so much of such avenue as lies within the limits of such city to arbitration in the following manner, to-wit: The board of public improvements of such city to select one disinterested person, the company owning such avenue to select another disinterested person, and these two [to] select the third disinterested person to act as arbitrators and all such arbitrators shall



be resident freeholders of such city; and the amount agreed upon by all these three arbitrators shall be binding on both such city and such company; and in case the arbitrator appointed by the board of public improvements of such city and the arbitrator appointed by such company cannot agree upon a third arbitrator, or all three of such arbitrators fail to agree on the amount to be paid for so much of such avenue as lies within the city limits, or in case the board of public improvements of such city, or the company owning such avenue refuse to submit to arbitration the question of the amount to be paid for such part of such avenue as lies within the limits of such city, then the board of public improvements of such city may proceed to condemn and appropriate so much of such avenue as lies within the city limits, for public purposes, in the same manner in which other property is condemned and appropriated by municipal corporations, except that the resolution of such board of public improvements deeming it necessary to condemn shall take the place and stand in lieu of the resolution of council required by sections 2234, 2235 and 2236, Revised Statutes of Ohio. [87 v. 241; 85 v. 152.]

**Sec. 3826b R. S. [Issue and sale of bonds.]** When the amount of compensation to be paid for such avenue appropriated under the preceding section shall have been ascertained either by agreement of the parties, by decision of the arbitrators or by the verdict of a jury in the proceedings instituted for the purpose, a fund shall be provided for the payment of such compensation together with the costs and expenses of such proceedings as may have been had, by issuing the bonds of such city for the amount thus ascertained; and it shall be the duty of the board of public improvements of such city to issue said bonds. Said bonds shall be made payable at such time and shall bear interest at such rate not to exceed four (4) per centum per annum as said board of public improvements shall determine; said bonds shall be signed by the president of the board of public improvements and the mayor of such city, and be attested by the comptroller of such city, and shall be secured by a pledge of the faith of such city and a tax, which it shall be the duty of the council of such city annually to levy upon the taxable property of such city, and certify the same to the county auditor, upon a certificate to that effect from the trustees of the sinking fund of such city, as to the amount necessary to pay the interest thereon and to provide a sinking fund for the final redemption of said bonds. Said tax shall be in addition to the amount now authorized to be levied for municipal pur-

poses. Said bonds shall be sold to the highest bidder by said board of public improvements at not less than their par value, after advertising the same for not less than four consecutive weeks, on the same day of the week, in some newspaper of general circulation in such city. [87 v. 242; 85 v. 152, 153.]

#### 4. SEWERAGE COMPANIES.

**Sec. 3871 R. S. [Sewerage companies.]** A company organized for the purpose of draining the streets, alleys, lots, commons, wharves, landings, or buildings of any city or village in this state, may construct and maintain sewers and drains, and lay conductors or pipe for conveying water and other liquid matter from the lots, houses, and streets, through and under the streets, sidewalks, public highways, alleys, commons, wharves, or landings of any city or village in this state; upon application by such company the council of any city, or the trustees of any village, may grant to it the privilege of exercising its corporate powers within the limits of such city or village, for such term of years, and upon such conditions and limitations, as may be deemed expedient; and the city council, or the council of the village, may require from the company such reasonable security as they deem necessary for the faithful performance of the duties imposed upon it by law; but no grant shall be made to any company, and no power or privilege shall be conferred upon or exercised by any company, which will interfere with the rights of any other corporation, or any person, and no person shall be taxed without his consent for any drainage or sewerage constructed by any such company; and such companies shall be liable for all damages occasioned by their acts, neglects, or defaults to the rights of persons and other corporations. [53 v. 137, § 5; S. & C. 341.]

**Sec. 3872 R. S. [When municipality must buy out company.]** When a city or village which has granted to any such company, for any term, the rights and privileges mentioned in the preceding section, and, at the expiration of the term, fails or refuses, upon petition of the company, to renew the grant, the city or village shall purchase of the company its property, consisting of sewers, drains, and pipes actually laid and constructed, with the appurtenances, and the materials and fixtures appertaining to the same, on hand at the time of the expiration of such term, at a price not exceeding the actual cost thereof, for the use and benefit of the city or village. [53 v. 137, § 5; S. & C. 341.]

**Sec. 3873 R. S. [Municipality may contract with company.]** The council of any city, or the council of any village, in which any such company is organized, may contract with the company for the construction and use of such sewers or drains, for draining the streets, alleys, lots, commons, wharves, or grounds within the limits of the municipal corporation; and the city or village shall not use such sewers or drains in any manner except by and with the consent of the company, and in the manner, and upon the terms and conditions, which are mutually agreed upon by the company and the city or village. [53 v. 137, § 6; S. & C. 342.]

**Sec. 3874 R. S. [Company may prescribe rates.]** Such companies may prescribe the terms upon which owners and occupants of houses or lots may obtain the use of their sewers and drains for private purposes, and the rate of charge annually for such use, and also the terms upon which the city or village may use the sewers and drains for public purposes. [53 v. 137, § 7; S. & C. 342.]

**Sec. 3875 R. S. [Powers of municipalities not limited.]** Nothing in the four preceding sections shall be construed to prevent any city or village from constructing sewers, or establishing and maintaining a system of sewerage, under the direction and by the authority of the municipal authorities thereof, not interfering, however, with the work of such company. [53 v. 137, § 8; S. & C. 342.]

## 5. COUNTY DITCHES IN MUNICIPAL LIMITS.

**Sec. 4483 R. S. [A municipal corporation may present a petition.]** The council of a municipal corporation may, by resolution, authorize the mayor to present a petition, signed by him officially, and a bond, to the county commissioners, to locate and construct a ditch described in the resolution, or such council may authorize the mayor to sign officially a petition and bond for a ditch, to be presented by parties interested whose lands are without the limits of the corporation, whenever the improvement will be conducive to the public health, convenience, or welfare, of the whole or any portion of the inhabitants of the corporation; in such case the commissioners shall count the municipal corporation as an individual petitioner, and may direct the surveyor or engineer to locate the improvement in accordance with the petition, whether wholly within or wholly without, or partly within and partly without, the limits of the corporation; and the surveyor or engineer, in making his schedule of lots and lands benefited, may enumerate such lots and lands within or without the corporate limits



as are specially benefited, and also the municipal corporation for benefits to the health and welfare of its inhabitants.<sup>1</sup>

(1) **Scope of section.**—This section only authorizes county commissioners to locate and construct ditch upon petition of mayor, but does not extend to deepening, widening or straightening ditch already established. *Cooper v. Van Wert*, 16 Dec. 638; 4 N. P. (N. S.) 185. Requisites of bond, see *Ib.*

Except as provided in §§ 4483 and 4485, county commissioners are without jurisdiction or authority to locate and construct a county ditch within the corporate limits of a municipality. *Village of Pleasant Hill v. Commissioners*, 71 O. S. 133.

**Sec. 4484 R. S.** [The whole or a part of a municipality may be considered a single tract.] When the improvement equally drains or otherwise benefits the whole of the territory within the limits of a municipal corporation, or any part thereof, the surveyor or engineer, or the commissioners, or the jury, if a jury be called, may consider and treat such territory as a single parcel of land; and any sum apportioned thereto shall be apportioned by the county auditor to the lots or lands included therein, according to the valuation thereof for taxation.

**Sec. 4485 R. S.** [Notice to municipal authorities, and proceedings thereafter.] If the proposed improvement passes through or into a municipal corporation the mayor of which has not signed the petition therefor as provided in the preceding section, the mayor shall be notified of the pendency of the petition in the same manner and at the same time that the commissioners are required by section *forty-four hundred and fifty-two* to be notified; the mayor shall notify the council of the pendency of the petition, at its next regular meeting, or, if necessary, call a special meeting of the council for that purpose; and thereupon the council shall appoint a committee of its members, or the engineer of the corporation, or both, to meet the commissioners, at the time and place of their meeting and view, and confer with them in regard to the improvement.

## 6. CONSTRUCTION AND REPAIR OF VIADUCTS.

An act to authorize municipalities to construct and repair viaducts and to provide for the manner in which funds raised for such purpose shall be expended.

[Sec. 1.] [Townships and municipalities authorized to construct or repair viaducts; bonds therefor.] That whenever the trustees of any township or hamlet, or the council, board of legislation, or other legislative body, or bodies shall have determined to issue bonds for the purpose of constructing or repairing any viaduct or viaducts over any street, stream, railway tracks or other place where an overhead roadway or footway

is deemed necessary, under the authority of section 2835<sup>1</sup> of the Revised Statutes; or whenever such trustees, council, board of legislation or other legislative board [or boards] shall have determined under the provision of said last named section to purchase or condemn, or whenever any such township, hamlet or municipal corporation shall have purchased or condemned any land for the purpose of constructing or repairing any viaduct or viaducts then and in that event said township, hamlet or municipal corporation shall have authority to construct or repair any such viaduct or viaducts and to purchase or condemn the necessary land therefor, if the same has not already been purchased or condemned, and the money arising from the sale of any of the bonds issued under the authority of section 2835 as aforesaid shall be expended as provided in section 2 thereof.

(1) **Section 2835** together with Longworth Bond Act, are re-enacted §§ 2836 and 2837, known as the in § 100 of the Code, p. 287.

[**Sec. 2.**] [**How money raised for such purpose to be expended.**] All funds arising from the sale of bonds for the construction or repair of viaducts or for the purchase or condemnation of land for such purpose as authorized by section 2835, Revised Statutes, shall be covered into the treasury of the township, hamlet or municipal corporation as the case may be, and shall be paid out and expended upon the vouchers of the board, officer or officers in such township, hamlet or municipal corporation having charge of the repair of public roads or streets therein. All contracts for such improvements shall be made by said board, officer or officers in the same manner as other contracts are now required by law to be made by them. All vouchers to pay said contracts or for any portion of the cost of such improvements shall be drawn by said board, officer or officers upon the clerk of the township or hamlet, or the auditor or clerk of the municipal corporation who shall keep an accurate account of all moneys so expended, and the funds created by the sale of bonds for viaduct purposes shall be known as the "Viaduct fund."

[**Sec. 3.**] [**In case of bond issue authorized by election.**] Whenever the voters of any township, hamlet or municipal corporation shall determine to issue bonds for the construction or repair of viaducts, or for the purchase or condemnation of the land necessary for such purpose as provided in section 2837,<sup>1</sup> Revised Statutes, the authority to make such improvements is hereby conferred and the money arising from the sale of such bonds shall be expended in the same manner as is

provided for the expenditures authorized in section 2 hereof. [May 12, 1902, 95 v. 567.]

(1) See note (1) under Sec. 1 of this act. *Supra*.

## 7. SPRINKLING THE STREETS.<sup>1</sup>

**An act to authorize, upon certain conditions, the sprinkling of streets, avenues, alleys, public squares and public places in municipal corporations.**

[Sec. 1.] **[Petition for sprinkling streets, etc.]** Upon the petition of thirty-five per cent. of the electors in any municipal corporation in this state to be certified by the mayor of said municipal corporation to the council, board of legislation or other legislative body, such council, board of legislation or other legislative body may by ordinance provide for sprinkling with water any and all or any part of the streets, avenues, alleys, squares and public places within the corporation in the manner provided in this act.

[Sec. 2.] **[Ordinance must receive affirmative vote of two-thirds of members of council.]** The ordinance to provide for said sprinkling shall not become operative unless it shall have received the affirmative votes of two-thirds of the members elected to said council, board of legislation or other legislative body.

[Sec. 3.] **[How and by whom to be done.]** Upon the certification of the petition provided for in section 1 hereof, and the passage of the ordinance authorized in section 2 hereof, the board or officer having charge of the repair of streets in such municipal corporation may purchase the appliances and materials and employ the labor necessary to provide for such sprinkling, or make contracts for all or any part of such sprinkling for periods not exceeding five (5) years.

[Sec. 4.] **[Tax levy therefor; street railway companies to pay portion of cost.]** In order to provide a fund for the purpose of paying all or any part of the cost of such sprinkling, the board or officer having charge of the repair of streets in such municipal corporation may each year estimate the cost thereof, and cause to be levied a tax therefor upon the general tax duplicate of the city in the same manner and subject to the same conditions as other levies for municipal purposes, except that such levy may be in addition to the amount now authorized for municipal purposes, and such levy upon said estimate, shall be made by the council, board of legislation or other legislative



body in said municipal corporation. Street railroad companies operating within such corporation shall annually pay into the treasury of said municipal corporation one (1) cent per lineal foot of track upon sprinkled streets as their part of the cost of the sprinkling herein provided for. [1902, May 9, 95 v. 447.]

(1) **New Code provisions** on the subject of sprinkling streets will be found in § 65 of the Code, page 231. § 65, however, provides only for the sprinkling of particular streets or parts of streets, while

the above act authorizes the sprinkling of any or all streets in the municipality upon the petition of 35 per cent. of the electors thereof.

See further, note 1, under § 65 of the Code, p. 231.

## 8. OILING OF STREETS.

[An act to authorize municipal corporations to contract to have treated with oil, for the purpose of laying the dust on, and preserving the surface of streets, avenues, alleys and public squares and places and roadways in public parks, and providing for the payment of the cost of such treatment by assessment on abutting property and from the corporation's funds.]<sup>1</sup>

[Sec. 1.] [Municipal corporations authorized to treat streets, etc., with oil; contracts.] Cities and villages shall have authority to treat with oil, for the purpose of laying the dust on, and preserving the surface of, streets, alleys, squares and public roadways. Whenever the council of any city or village desires to have such work performed by contract, it shall pass an ordinance declaring its intent so to do, and in villages the council shall contract and in cities the council shall direct the board of public service to contract, for a period named, not exceeding five years, with any person or corporation organized for such purpose, for treating with oil the streets, alleys, lanes, squares and public roadways and places, such contract to include all the districts established as hereinafter provided during the entire term of said contract. Such contract shall be made in accordance with the general laws governing municipal contracts, except that the requirement of section 45 of an act "to provide for the organization of cities and incorporated villages and to restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent the abuse of such powers, as provided by the constitution of Ohio, and to repeal all sections of the

Revised Statutes inconsistent therewith," passed October 22, 1902, that a certificate that the necessary money is in the treasury shall not apply to such contracts, nor shall the provision of section 1691 of the Revised Statutes (revision 1880) apply to any such contract.

(1) **Validity** of this act sustained. County, no report.  
Eyre v. Norwood, Cir. Ct. Hamilton

[**Sec. 2.**] [**Establishment of district.**] Districts within which the streets, alleys and roadways shall be treated with oil, for the purpose of laying the dust thereon and preserving the surface thereof, may be established as follows:

1. [**Upon petition of property owners.**] When a written petition signed by the owners of a majority of the abutting feet of property on any street or alley, or part thereof, or of connecting or intersecting streets or alleys, or parts thereof, having a roadway area of not less than twenty thousand square yards, is presented to the board of public service in any city or the council in any village, praying that the roadways within the territory described be treated with oil and for the assessment of the whole cost thereof on the property abutting such streets or alleys, the board or council shall forthwith declare, by resolution, such territory to be a district within which the roadways will be treated with oil, for a period named in the petition and not exceeding the life of the contract, and the cost thereof assessed upon the property abutting the streets or alleys therein by the abutting foot.

2. [**By municipal authorities.**] When, in the opinion of the board of public service in any city or of council in any village, the treatment with oil, for the purpose of laying the dust on and preserving the surface of the roadways of any public park or parks, or of any street or alley, or part thereof, or of connecting or intersecting streets or alleys, or parts thereof, having a roadway area of not less than twenty thousand square yards, will be of general benefit within the corporation, the board or council may declare by resolution such park or parks, or the territory including such street or alley, or part thereof, or intersection or connecting streets and alleys, or parts thereof, to be a district within which the roadways shall be treated with oil, for a period named in the resolution and not exceeding the life of the contract, the whole cost, or such portion thereof as may by the board or council be deemed just, to be paid by the corporation, and any remainder of the cost to be assessed by the abutting foot on the property abutting the streets or alleys in such district; provided, that there shall be no assessment levied on any property in excess of

fifty per cent. of the whole cost, except where petitioned for, as hereinbefore provided.

[Sec. 3.] **[Assessment of property.]** Whenever any portion of the cost is to be assessed against private property, notice to the owners of the property shall be given by publishing the resolution establishing the district and setting forth the portion of the cost to be assessed, once each week, for two weeks in some newspaper published and of general circulation in the corporation, and if there is no newspaper published in such city or village, copies of the resolution shall be posted in twelve public places in the city or village.

[Sec. 4.] **[Objections to assessment.]** If any owner objects to the assessment, he shall file his objections in writing with the board of public service in cities, and the council in villages, within ten days after such publication or posting, and thereupon the board of public service in cities and council in villages shall consider such objections, and, if they are found to be well taken, may remit the whole, or such portion as is deemed just, of the assessment against the property of the objecting owner, and any deficiency arising from such remitter may be made up from any fund of the corporation available for cleaning and repairing of streets, or by contributions from the owners desiring that the work be done.

[Sec. 5.] **[Notification of contractor to proceed with work.]** After the expiration of the time within which objections may be filed, and the disposition of any objections, the board of public service in cities and council in villages shall notify the contractor of the passage of the resolution creating such district and direct such contractor to proceed with the work of treating with oil the roadways in the streets or alleys of such district, fixing in the notice to the contractor some reasonable period of time within which such work shall be begun.

[Sec. 6.] **[Assessments and the collection thereof; bonds may be issued.]** Where the whole or any portion of the cost is to be assessed, the board of public service in any city and council in any village shall, within thirty days after the first treatment with oil in any district has been accomplished, and at its option may, at any time previous thereto, levy an assessment by the abutting foot on the property abutting the streets and alleys in such district to pay the whole or such portion of the cost as was in the resolution determined. The assessment so levied may be collected in one or more installments in the manner provided in the case of assessments for



street improvements, with a penalty of five per centum and interest for failure to pay at the time fixed in the assessing ordinance; provided, however, that no assessment shall be collected in more than one installment unless the work petitioned for shall cover a period of time greater than one year, when the installments may equal in number the years for which the district was created. Bonds or certificates of indebtedness may be issued and sold in anticipation of the collection of said assessments, or installments of assessments, and there may be included in one bond issue or one certificate of indebtedness the amount of uncollected assessments, or installments of assessments, levied on the property in any number of districts and payable within any one calendar year. In the cost shall be included the cost of work done on intersections and roadways within the district, advertising, inspection and superintendence. The right of the city or village to levy said assessments shall not be affected by the amount of assessments theretofore levied upon said property.

[Sec. 7.] [Treatment herein provided regarded as a cleaning and repairing of streets, etc.] The treatment with oil in this act provided for shall be regarded as a cleaning and repairing of streets and alleys, and the corporation's portion of the cost thereof may be paid from any fund available for the cleaning or repairing of streets or alleys, and when the roadways of any public park or parks are ordered to be so treated, the cost thereof may be paid from any fund available for the care or maintenance of such parks.

[Sec. 8.] [Term "owner" defined.] The term "owner," within the meaning of this act, shall be held to include the legal or equitable owner, the person in whose name the property may be assessed for taxation on the tax duplicate, or a tenant giving satisfactory guaranty that the assessment against the property signed for will be paid. [1906, March 14, 98 v. 50.]

## 9. NUISANCES IN STREETS.

**Sec. 6921.** [Nuisances.] Whoever erects, continues, uses, or maintains, any building, structure, or place for the exercise of any trade, employment, or business, or for the keeping or feeding of any animal, which, by occasioning noxious exhalations, or noisome or offensive smells, becomes injurious to the health, comfort, or property of individuals, or the public, or causes or suffers any offal, filth, or noisome

substance, to be collected, or to remain, in any place, to the damage or prejudice of others, or the public, or obstructs or impedes, without legal authority, the passage of any navigable river, harbor, or collection of water, or corrupts, or renders unwholesome or impure, any water-course, stream, or water, or unlawfully diverts any such water-course from its natural course or state, to the injury or prejudice of others, or obstructs or incumbers, by fences, buildings, structures, or otherwise, any public ground, or highway, or any street or alley of any municipal corporation, shall be fined not more than five hundred dollars. [30 v. 22, §§ 1, 2; 54 v. 130, §§ 1, 2; 72 v. 112, § 1; 32 v. 38, § 1; S. & C. 441; S. & C. 878; S. & C. 880.]

## 10. MISCELLANEOUS PROVISIONS AS TO ASSESSMENTS.<sup>1</sup>

**Sec. 2301 R. S.** [Expense of changing established grades: how paid; Toledo.]<sup>2</sup> That when a street, alley, public highway, wharf or landing, within the corporation, is graded, or pavements are constructed in conformity to grades established by the authorities of the corporation, and the expense is assessed on the abutting lots or lands, the owners shall not be subject to any special assessment occasioned by any subsequent change of grade in such pavement, street, alley, public highway, wharf or landing unless a petition for such change is subscribed by a majority of the owners of such lots or lands, and the expense of all improvements occasioned by such change of grade not so petitioned for shall be chargeable to the general fund of the corporation; provided, that in cities of the third grade of the first class a petition for such change subscribed by the owners of a majority of the feet front of such lots or lands shall have the same effect as when subscribed by a majority of said owners.<sup>3</sup> [1888, April 5: 85 v. 158; Rev. Stat. 1880; 66 v. 243, § 560; (S. & S. 838).]

(1) Sections carried under this heading are certain sections in the chapter on assessments (Chap. 4, Div. 4, Title XII. R. S.) not re-enacted in the Code and not expressly repealed.

For re-enacted sections on assessments see § 94 of the Code, page 260 *et seq.*

(2) This section is, with the exception of the latter part relating to Toledo, almost identical with § 64 of the Code (page 230), and is probably superseded by that section.

(3) For notes on the subject of this section, see notes under § 64 of the Code, page 230.

**Sec. 2313 R. S.** [Assessment for sprinkling, etc., lien on land charged.] <sup>1</sup> Every such assessment shall be a lien on the lands charged from the time the council determines the amount assessed against each parcel of land. [66 v. 221, § 437.]

(1) **Sprinkling streets.**— See § STREETS, *supra*, in Part II, and note 65 of the Code, page 231, and see under said act.  
act under title SPRINKLING THE

**Sec. 2314 R. S.** [Expense of collecting to be added to assessment.] <sup>1</sup> In placing such assessment on the tax list, the county auditor is required to add to each assessment such per centum as he may deem necessary to defray the expenses of collecting the same. [66 v. 222, § 438.]

(1) See § 65 of the Code, page 231.

**Sec. 2404 R. S.** [Repairs of sewers, ditches, etc.] The council may, whenever it is deemed necessary, provide for the repair or reconstruction of any sewer, ditch, or drain; and the proceedings for that purpose shall be the same, so far as applicable, as are herein required for the original construction thereof.<sup>1</sup> [66 v. 256, § 638.]

(1) See § 77 *et seq.* of the Code.

## 11. CONSTRUCTION OF SIDEWALKS IN VILLAGES.

**An act to provide for the construction of sidewalks in villages.**<sup>1</sup>

[Sec. 1.] [Provision for the construction of sidewalks in villages.] That the council of villages, may, upon the petition of the owners of two-thirds of the front feet of lots or lands abutting upon one or both sides of any street or portion of street between points designated in the petition, provide by ordinance for the construction of sidewalks along said street or portion thereof, on one or both sides, as designated in the petition, and of such materials and width as may be designated in said peti-



tion. The supervision of the construction of said sidewalks shall be by the council or a proper committee thereof. The construction of said sidewalks shall be governed in all respects by the provisions of title 12 of the Revised Statutes of Ohio relating to the improvement of streets. One-half of the cost and expenses of said sidewalk or sidewalks shall be defrayed by the village and the other half shall be assessed against the property abutting on such street or portion of street between the points designated in said petition, in the manner designated in said petition.

[Sec. 2.] [Assessments.] Whenever council shall order sidewalks to be constructed in accordance with the prayer of a petition as referred to in the foregoing section, it shall also provide for the payment of the property owner's one-half of the cost and expenses thereof, in two or more equal annual installments, and make corresponding annual assessments therefor on the property abutting upon said improvement, and such assessment shall be collected or certified as assessments for street improvements, and be a lien upon the property assessed. The council is hereby authorized to issue bonds in anticipation of the collection of the amount chargeable against the property owners, which bonds shall bear interest at a rate not to exceed six per cent. per annum, and shall be sold for not less than par.

[Sec. 3.] [Bonds to pay village's portion of cost.] For the purpose of paying the village's portion of the cost and expenses of constructing said sidewalk or sidewalks, the council is hereby authorized to borrow money at such times and in such amounts as may be required, and may issue bonds of the village for money so borrowed at a rate of interest not to exceed six per cent. per annum, payable semi-annually, and of such denomination as the council may determine. The issuing and sale of such bonds shall be governed by the provisions of the Revised Statutes of Ohio applicable to the issuing and sale of municipal corporation bonds. The council is hereby authorized to levy upon all the taxable property of the village, in addition to the taxes now allowed by law, such tax as may be necessary to pay the principal and interest of said bonds as they mature, said tax to be levied and collected in the same manner as taxes

for general purposes in villages are levied and collected. [1904, April 26, 97 v. 481.]

(1) **Code provisions** on subject above act provides an additional of construction of sidewalks in both method by which sidewalks may be cities and villages will be found in constructed and the costs assessed, § 70 of the Code, page 236. The in villages.

**Sec. 4909 R. S. [Sidewalks along roads authorized.]** Any person or board of education, the council of any village, the trustees of any cemetery association, or any agricultural or religious society may appropriate on any public road of sufficient width on either side thereof, sufficient land to construct thereon a public sidewalk not exceeding six feet in width, and may construct such sidewalk thereon; but such sidewalks shall not obstruct any private entrance or public highway. [1889, February 12: 86 v. 33; 79 v. 131; 77 v. 145; Rev. Stat. 1880; 64 v. 107, § 1; (S. & S. 693; S. & C. 1552.)]

## XVII

INJURIES FROM EXCAVATIONS.<sup>1</sup>

**Sec. 2676 R. S.** [Damage by excavation to be recovered by civil action.]<sup>2</sup> If the owner<sup>3</sup> or possessor of any lot or land,<sup>4</sup> in any city or village, digs, or causes to be dug, any cellar, pit, vault, or excavation, to a greater depth than nine feet<sup>5</sup> below the curb of the street or streets on which such lot or land abuts, or, if there be no curb, below the established grade of the street or streets on which such lot or land abuts, or if there be no curb or established grade, below the surface<sup>6</sup> of the adjoining lots, and by such excavation, causes any damage to any wall, house, or other building upon the lots adjoining thereto, such owner or possessor shall be liable, in a civil action, to the party injured, to the full amount of the damage aforesaid.<sup>7</sup> When there is a curb or established grade, the depth of such excavation, at any point thereof, shall be measured downward from the pitch line projecting laterally over the lot or land from and between the corresponding points in the nearest curb or established grade opposite the ends of such pitch line. [66 v. 232; 97 v. 323.]

**(1) Title, division and chapter.**

—Sections carried under this heading formed Chap. 17, Div. 8, Title XII, Bates' Revised Statutes. None of the sections in this chapter are repealed by the Code.

**(2) Validity.**—This act is constitutional. *Emery v. Coles*, 5 N. P. 199.

**(3) Owner does not include school board holding property for school purposes.** *Bd. of Ed. v. Volk*, 72 O. S. 469.

**(4) Lot or land.**—This section does not apply to improvements in streets and alleys. *Allison v. Cincinnati*, 2 C. S. C. R. 462.

**(5) No support required when.**—One may dig a cellar nine feet

without supporting adjacent walls.

The owner of a lot who erects a building that would be injured by the excavation on the adjoining lot to the statutory depth does so at his peril. *McMillan v. Watt*, 27 O. S. 306.

But the lot owner digging to the statutory depth is not relieved from negligence by this statute. *Cincinnati, etc., R. R. v. Pfau*, 9 B. 200 (aff'd, 16 B. 7).

**How to determine nine foot depth.**—Where a lot extends from one street to another of a different grade the nine feet below the curb is a line from nine feet below the upper curb to a point nine feet below



lower curb. *Elshoff v. Deremo*, 3 N. P. 273.

(6) **Surface.**—Surface means the actual surface whether caused by filling in or not, and not the natural surface before any filling. *Burkhardt v. Hanley*, 23 O. S. 558.

(7) **Construction of section.**—The clear meaning of §§ 2676 and 2677 R. S. is to limit their application to a lot abutting on the same street as that upon which abuts the lot in which the excavation is made. *Taylor v. Day*, 6 N. P. 447.

The effect of this section is to amplify the common law rule as to lateral support, so as to create a liability for removing the lateral support of buildings where the excavation goes more than nine feet below the street grade, but it does not modify the common law rule as to the lateral support of the soil itself. *Belden v. Franklin*, 28 C. C. 373; 8 C. C. (N. S.) 159. But see *Hall v. Kleeman*, 4 N. P. 201; *Volk v. Board of Education*, 7 N. P. 164 (reversed 72 O. S. 469).

**Sec. 2677 R. S. [Depth of excavation allowable.]** Such owner or possessor may dig, or cause to be dug, any such cellar, pit or excavation, to the full depth of any foundation wall of any building upon the adjoining lot or lots, or to the full depth of nine feet below the established grade of the street or streets whereon such lot abuts, without reference to the depth of adjoining foundation walls, without incurring the liability prescribed in this chapter, and may, on thirty days' notice to adjoining owners, grade and improve the surface of any lot to correspond with the established grade of the street, streets or alley, upon which such lot or land abuts, without incurring liability.<sup>1</sup> [91 v. 211; 66 v. 232; 97 v. 323.]

(1) **Right to grade.**—A lot owner in a city or village may with impunity, in the absence of negligence and upon giving proper notice, grade his lot to conform to the grade of the street. *Hall v. Kleeman*, 4 N. P. 201, 203.

But where statutory notice is not

given the common law rule would prevail. *Ib.*

**Liability of owner when notified.**—Where owner has received notice of excavation in adjoining lot and his house is damaged by such excavation he is liable to a tenant injured thereby. *Kuhn v. Remmler*, 16 B. 366.

## XVIII

### LIBRARIES.<sup>1</sup>

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#### 1. IN CERTAIN CITIES AND VILLAGES.

**Sec. 4002—39 R. S.** [Certain cities and villages may have library; tax.] The common council of every city not exceeding in population thirty thousand inhabitants, and of every incorporated village shall have power to establish and maintain a public library and reading room, and for such purpose may annually levy and cause to be collected as other general taxes are, a tax not exceeding one mill on each dollar of the taxable property of such city or village, to constitute the library fund, which shall be kept by the treasurer separate and apart from other money of the city or village, and be used exclusively for the purchase of books, periodicals, necessary furniture and fixtures and whatever is required for the proper maintenance of such library and reading room. [89 v. 98.]

(1) **New code provisions** with respect to the management and control of free municipal libraries will be found in § 218 of the Code.

**Power to establish and maintain public libraries** is given to all municipalities in § 7, paragraph 22 of the Code, page 61; and power to appropriate sites for library buildings is given in § 10 of the Code, page 81.

**Power to issue bonds**, given to "any public library board," see "An act to provide for the erection and equipment of public library buildings," 98 O. L. 260.

**Special acts relating to public libraries.**

*Cincinnati*, §§ 3999, 3999a, 3999b, 3999c, 3999d, 3999e, R. S., and 95 O. L. 361.

*Cleveland*, §§ 4000, 4001, 4002, 4002-1 to 4002-18, inclusive, R. S., and 95 O. L. 438.

*Toledo*, §§ 4002-19 to 4002-31, inclusive, R. S.

*Dayton*, §§ 4002-32 to 4002-38, inclusive, R. S.

*Portsmouth*, §§ 4003-4006, inclusive, R. S.

*Canton*, 94 O. L. 739.

*Findlay*, 85 O. L. 546.

*Youngstown*, 87 O. L. 105.

*Ironton*, 90 O. L. 311.

*Cambridge*, 95 O. L., 736.

*Cities of fourth grade, second class*, §§ 4002-46 to 4002-49, inclusive, R. S.

**Validity of special acts** relating to libraries. The act of May 9, 1902, authorizing the trustees of the public library of the school district of the city of Cincinnati to

receive a donation from Mr. Andrew Carnegie and to establish branch libraries, was held unconstitutional by the Supreme Court without report, in *Sadler v. Porter*, 67 O. S. 531, on the authority of *Cincinnati v. Trustees of Hospital*, 66 O. S.

440, and *State ex rel. v. Spellmire*, 67 O. S. 77.

**School libraries.**—For acts relating thereto, see §§ 3995, 3996, 3997, 3998, 3999 R. S., and 95 O. L. 478; 96 O. L. 8.

**Township libraries.**—See §§ 1476, 1477, 1478 R. S.

**Sec. 4002—40 R. S. [Directors.]** For the government of such library and reading room there shall be a board of six directors,<sup>1</sup> appointed by the council of such city or village from among the citizens thereof at large, and not more than one member of the council of such city or village shall at any one time be a member of said board. Such directors shall hold their office for three years from the date of appointment, and until their successors are appointed, but upon their first appointment they shall divide themselves at their first meeting by lot into three classes, one-third for one year, one-third for two years, and one-third for three years, and their terms shall expire accordingly. All vacancies shall be immediately reported by the directors to the proper council, and be filled by appointment in like manner; and if an unexpired term, for the residue of the term only. No compensation whatever shall be paid or allowed to any director. [89 v. 98.]

(1) **Managing board.**—By § 218 of the Code the custody and management of all public libraries

established by municipal corporations are vested in *six trustees to be appointed by the mayor*.

**Sec. 4002—41 R. S. [Organization; by-laws, etc.; control of expenditures; custody of building; how money drawn from treasury; librarian and assistants.]** Said directors<sup>1</sup> shall, immediately after their appointment, meet and organize by the election of one of their number president, and by the election of such other officers as they may deem necessary. They shall make and adopt such by-laws, rules and regulations for their own guidance, and for the government of the library and reading room, as may be expedient. They shall have the exclusive control of the expenditures of all moneys collected for the library fund, and the supervision, care and custody of the rooms or buildings constructed, leased or set apart for that purpose, and such money shall be drawn from the treasury by the proper officers, upon the properly authenticated voucher of the board of directors, without otherwise being audited. They may,



with the approval of the common council, lease and occupy, or purchase, or erect on purchased ground, an appropriate building, provided that no more than half the income in any one year can be set apart in said year for such purchase or building. They may appoint a librarian and assistants, and prescribe rules for their conduct. [89 v. 98.]

(1) See note (1) to § 4002-40, *supra*.

**Sec. 4002—42 R. S. [Who may use library.]** Every library and reading room established under this chapter shall be forever free for the use of the inhabitants of the city or village where located, always subject to such reasonable rules and regulations as the library board<sup>1</sup> may find necessary to adopt and publish in order to render the use of said library and reading room of the greatest benefit to the greatest number; and they may exclude and cut off from the use of said library and reading room any and all persons who shall willfully violate such rules. [89 v. 98.]

(1) See note (1) to § 4002-40, *supra*.

**Sec. 4002—43 R. S. [Annual report.]** The said board of directors<sup>1</sup> shall make an annual report to such council, stating the condition of their trust—the various sums of money received from the library fund, and from all other sources, and how much has been expended; the number of books and periodicals on hand; the number added by purchase, gift or otherwise during the year; the number lost or missing, the number of books loaned out, and the general character and kind of such books, with such other statistics, information and suggestions as they may deem of general interest. [89 v. 98.]

(1) See note (1) to § 4002-40, *supra*.

**Sec. 4002—44 R. S. [Donations.]** All persons desirous of making donations of money, personal property or real estate, for the benefit of such library, shall have the right to vest the title of the same in the board of directors<sup>1</sup> created under this law, to be held and controlled by said board, when accepted according to the terms of the deed of gift, devise or bequest of such property, and as to such property the said board shall be held and considered to be special trustees. [89 v. 98.]

(1) See note (1) to § 4002-40, *supra*.

**Sec. 4002—45 R. S.** [Tax to assist existing library association.] In case a free public library has already been established in any city or incorporated village, and duly incorporated and organized, the council may levy a tax <sup>1</sup> for its support as provided in this act, without change in the organization of such library association, and the sum so raised shall be paid to the officer or officers duly authorized to receive the same, and shall be under the control of the said library association; provided, that if at any time such library association ceases to exist or from any reason fails to provide a free circulating library as required by the provisions of this act, the books and other property accumulated from the proceeds of the levy herein authorized shall become the property of the city or village and be subject to the control of the council as herein provided. [89 v. 98.]

(1) **Tax for public library purposes.**—See §§ 32 and 33 of the Code, pages 157 and 158. Tax levy authorized as recompense to private association maintaining free public library, see § 219 of the Code.

**An act to authorize the transfer of property by municipal corporations to trustees of libraries of school districts, and the acceptance of the same, and other property, for library purposes by said trustees.**

[Sec. 1.] [Transfer of library property from municipalities to school districts.] That it shall be lawful for any municipal corporation in this state to transfer by ordinance duly passed, any property, real or personal, acquired or suitable for library purposes, to the trustees of any public library for the school district within which such municipal corporation is situate, upon such lawful terms and conditions as may be agreed to between said municipal corporation and said trustees.

[Sec. 2.] [Power of school districts to receive.] The trustees of any public library in any such school district are hereby authorized and empowered to receive and accept any such transfer, and to receive and accept from any other source or acquire in any other manner, any property, real or personal, for library purposes, and use and apply the same for such purposes, and to enter into any contract relating thereto. [1904, April 21, 97 v. 133.]

## 2. APPROPRIATION OF FINES TO LAW LIBRARIES.<sup>1</sup>

**Sec. 2680 R. S.** [Appropriation of certain fines in police court to use of libraries.] All fines and penalties which are assessed and collected by the police court for offenses and misdemeanors prosecuted in the name of the state, except a portion thereof equal to the compensation allowed by the county commissioners to the judges, clerk and prosecuting attorney of such court, in state cases, which shall be retained by the clerk, shall be paid by the clerk quarterly to the trustees of such law library associations mentioned in the next two preceding sections, except those in cities of the first and second grades of the first class, but the sums so paid shall not be less than five hundred dollars per annum, if there be such an amount, and the trustees of such associations shall, on the first Monday of each year, make a detailed statement to the auditor of the county, verified by the oath of the treasurer of the association, of the amount of the fines and penalties so received, and of the money expended by the association. In counties containing cities of the second grade of the first class there shall be paid to the trustees of such library association the sum of five hundred dollars per annum from the county treasury and five hundred dollars per annum from the city treasury, said sums to be paid in quarterly installments. The monies so paid to be expended in the purchase of law books and the maintenance of such association. All justices of the peace of such counties and all officers of the townships, villages and cities therein shall have the same free use of the books of such library receiving such monies as the judges and county officers. In cities of the first grade of the first class, all fines and penalties which are or have been assessed and collected by the police court for offences prosecuted in the name of the state, shall be disposed of as directed by sections 1807 and 1812 of the Revised Statutes of Ohio, and the clerk of the police court, in cities of the first grade of the first class, shall be relieved of all responsibility and liability for any such fines and penalties assessed and collected as have been or may be paid over to the county auditor as directed by sections 1807 and 1812 of the Revised Statutes of Ohio. [94 v. 135; 91 v. 296; 89 v. 51; 69 v. 165, § 2.]

(1) Sections carried under this heading formed part of Ch. 18, Div. 8, Title XII., R. S. None of the sections in this chapter were re-

pealed by the Code, but §§ 2678 and 2679, not carried here, relate solely to counties and not to cities.



**Sec. 2680a R. S.** [Certain fines to use of library in Darke county.] That in all counties which at the last federal census had a population of not more than 42,965 nor less than 42,958 in which there is such library association mentioned in section 2680, and in which there is no such police court, that all fines and penalties which are assessed and collected by the common pleas and probate courts of such counties for offenses and misdemeanors prosecuted in the name of the state, except a portion thereof equal to the compensation allowed by law to the prosecuting attorney of the county in state cases, shall be paid quarterly by the clerk of the court of common pleas and the probate judge, respectively, to the trustees of such law library associations, to be expended in the purchase of law books and the maintenance of such associations; but the sum so paid shall not exceed four hundred dollars per annum, and subject in all other respects to the provisions contained in section 2680. [90 v. 312.]

**Sec. 2680b. R. S.** [Same in Butler county.] That in all counties in which there is such library association mentioned in section 2680, and in which there is a city of the third grade *b* of the second class, containing a free library and in which there is no such police court, that one-half of all fines and penalties which are assessed and collected by the mayor of said city, prosecuted in the name of the state or city, shall be paid quarterly by said mayor to the trustees of such library association, to be expended in the purchase of law books and the maintenance of such association; and the other half shall be paid quarterly by said mayor to the trustees of said free library to be expended in like manner, but the sum so paid shall not exceed five hundred dollars per annum, and should be subject in all other respects to the provisions contained in section 2680. [91 v. 369; 91 v. 219.]

**Sec. 2680c R. S.** [Same in Columbiana county.] That in all counties, which, at the last federal census had a population of not more than fifty-nine thousand and thirty-five and not less than fifty-nine thousand and twenty-five, in which there is such a law library association as that mentioned in section 2680, and in which there is no such police court, fifteen per cent. of all fines and penalties which are assessed and collected by the common pleas and probate courts of such counties, for offenses and misdemeanors prosecuted in the name of the state, except that portion thereof allowed by law to the prosecuting attor-

ney in such cases, shall be paid quarterly by the clerk of the court of common pleas and probate judge, of such counties, to the trustees of such law library association, to be expended in the purchase of law books and the maintenance of such associations and such library associations and libraries shall be subject in all other respects, to the provisions contained in section 2680. [92 v. 430.]

**Sec. 2680d R. S.** [Same in Washington county.] That in Washington county in which such library association mentioned in said section 2680 shall be formed, and in which there is no police court, twenty-five per cent. of all fines and penalties which are assessed and collected by the common pleas and probate courts of such counties for offenses and misdemeanors prosecuted in said courts, less the compensation allowed by law to the prosecuting attorney of the county in state cases, shall be paid, quarterly, by the clerk of the court of common pleas and the probate judge, respectively, to the trustees of such library association, and that one-fourth of all fines and penalties which are assessed and collected by the mayor of the city of Marietta, prosecuted in the name of the state or said city, shall be paid quarterly by said mayor to the trustees of such library association, all of said sums so paid shall be expended in the purchase of law books and the maintenance of such association, subject in all other respects to the provisions of said section 2680. [93 v. 505.]

## XIX

## TAXATION AND EQUALIZATION.

## 1. TAXATION.

**Sec. 2690c R. S.** [Approval of levies by tax commissioners of certain cities; limitation of levy.]<sup>1</sup> No tax shall be levied upon the property of any such city<sup>2</sup> by the council thereof or any other authority therein, except by the boards of education in cities of the first grade of the first class, cities of the third grade of the first class, and cities of the first grade of the second class, for school and educational purposes, until approved by the board of tax commissioners aforesaid. Provided, that in cities of the third grade of the first class boards of education shall not levy in excess of seven (7) mills on the dollar of the tax property thereof, in any one year.<sup>3</sup> [May 7, 1902, 95 v. 415; 93 v. 409; 83 v. 47; 81 v. 177; 80 v. 124, 125.]

(1) **Title, division and chapter.**  
The section carried here was in Chap. 1, Div. 9, Title XII, R. S. All the sections of this chapter are repealed by the Code except that given

here, and § 2681 R. S., which will be found under HAMLETS, *infra*.

(2) This refers to the cities mentioned in § 2690a R. S., repealed.

(3) See §§ 39 and 49 of the Code, pages 164 and 179.

**Sec. 2709 R. S.** [Municipal bonds first offered to sinking fund trustees.]<sup>1</sup> Whenever any municipal corporation issues its bonds, it shall first offer them at par and accrued interest to the trustees or commissioners, in their official capacity, of the sinking fund, or, in case there are no such trustees or commissioners, to the officer or officers of such corporation having charge of its debts, in their official capacity, and only after their refusal to take all or any of such bonds at par and interest, bona fide for and to be held for the benefit of such corporation, sinking fund or debt, shall such bonds, or as many of them as remain, be advertised for public sale.

[Not to be sold for less than par.] In no case shall the bonds of the corporation be sold for less than their par value; nor shall such bonds, when so held for the benefit of such sinking fund or debt, be sold, except when necessary to meet the requirements of such fund or debt.



[Sold to highest bidder after notice by publication.] All sales of bonds, other than to the sinking fund, by any municipal corporation, shall be to the highest and best bidder, after thirty days' notice in at least two leading newspapers of opposite politics and of general circulation in the county where such municipal corporation is situated, setting forth the nature, amount, rate of interest and length of time the bonds have to run, with time and place of sale. Additional notice may be published outside of such county by order of the corporation council.

[When may be sold at private sale.] Provided, however, when any such bonds have been once so advertised and offered for public sale, and the same, or any part thereof, remain unsold, then said bonds, or as many as remain unsold, may be sold at private sale at not less than their par value, under the direction of the mayor, and the officers and agents of the corporation by whom said bonds have been, or shall be prepared, advertised and offered at public sale.

[Refunding of corporate indebtedness.] Provided, further, that when it shall appear to the trustees or council of any municipal corporation to be for the best interests of such corporation to renew or refund any bonded indebtedness of such corporation which shall not have matured, and thereby reduce the rate of interest thereon, such trustees or council shall have authority to issue for that purpose new bonds, with semi-annual interest coupons attached and to exchange the same with the holder or holders of such outstanding bonds, if such holder or holders shall consent to make such exchange and to such reduction of interest.

[Rates of interest.] But the rate per annum of interest on any such new bonds thus issued in exchange by any city of the first class, or by any city of the first or second grade of the second class shall not exceed four and one-half ( $4\frac{1}{2}$ ) per cent., and by any other city shall not exceed five (5) per cent., and by other municipalities shall not exceed five and one-half ( $5\frac{1}{2}$ ) per cent.; such new bonds shall not in any case be so issued in an amount in excess of such outstanding bonded indebtedness so to be renewed or refunded, and may be in such denominations and payable at such time or times and at such place as may be determined by such trustees or council. [1902, May 10, 95 v. 507; 93 v. 340; 91 v. 383; 88 v. 66; 87 v. 269; 80 v. 168; Rev. Stat. 1880; 66 v. 263, § 670.]

(1) **New Code provisions.**— most identical with § 97 of the This section was in Chap. 2, Div. 9, Code. § 2709 R. S. is, however, not Title XII, R. S. The section is expressly repealed by the Code.

**Sec. 2834 R. S.** [Surplus of special tax or loan may be transferred to general fund.] Whenever there is in the treasury of

any city, village, hamlet, county, township or school district, any surplus of the proceeds of a special tax, or of the proceeds of a loan for a special purpose, which surplus is not needed for the purpose for which the tax was levied, or the loan made, such surplus may be transferred to the general fund by an order of the proper authorities entered on their minutes; and whenever there is in the treasury of any such civil division, at the annual meeting or meetings otherwise provided by law at which the annual tax levy is to be considered and adopted any surplus not exceeding one thousand dollars in any one established fund or division of the funds, which surplus is not needed for the purpose for which the fund was created, or the money appropriated, or the tax levied, before such annual tax levy is made, such surplus may be considered as unappropriated and may be reappropriated, and transferred, by an order as aforesaid, to some other existing fund for which a tax is to be or would otherwise be levied, and the sum which it would be necessary to raise by taxation for any purpose, if no such reapportionment was made, shall thereupon be reduced to the extent of the transfer thus made; provided, however, that this act shall in no wise be considered as authority to make such reapportionments or any transfer of funds at any other time than the meeting aforesaid to determine the tax levy nor to authorize transfers at any one such meeting of over three thousand dollars in the aggregate, nor that the amount which may be lawfully raised by taxation for any purpose may be increased by such transfer.<sup>1</sup> [92 v. 77; 75 v. 132, § 1.]

(1) **Transfer of funds under the Code.**—See § 43 of the Code, page 167, and “an act to further

provide for the transfer of public funds,” page 170.

**An act to authorize the council of any incorporated village in Ohio to levy an additional tax for fire protection purposes.**

[Sec. 1.] [Village council authorized to levy additional tax for fire protection purposes.] That the council of any incorporated village in the state of Ohio, be, and they hereby are, authorized to levy an additional tax of five mills for the purpose of defraying the expense of constructing and maintaining a water line, connecting any village with any water supply and for the purpose of maintaining said pipe line for fire protection purposes, to any village. Said tax of five mills to be levied upon all taxable property included in any incorporated village for the years, 1904, 1905, 1906, 1907 and 1908; and said tax to be in addition to the taxes now authorized by law. [1904, April 25, 97 v. 407.]

[An act to authorize councils of villages to levy a tax for street lighting and fire protection.]

[Sec. 1.] [Village council authorized to levy tax for support of municipal waterworks or electric light plant.] That when waterworks and electric light plants or either of them are owned, run and controlled by any village, and such village receives its street lighting and fire protection from such plant or plants and the proceeds derived from the operation of such plant or plants is found to be insufficient to pay the expenses of running and conducting such waterworks and electric [light] plants, or either of them, the council of such village may levy a tax not to exceed five mills on each dollar valuation of all the taxable property listed for taxation in said village, both real and personal, to pay the running expenses and the extensions made to such plant after applying the proceeds of such [said] plant thereto. Said tax to be in addition to all other tax now authorized by law. [1906, March 14, 98 v. 46.]

## 2. PROPERTY EXEMPT FROM TAXATION.

**Sec. 2732 R. S.** [Property exempt.] The following property shall be exempt from taxation:

*First.* [Schools and churches.]<sup>1</sup> All public school-houses, and houses used exclusively for public worship, the books and furniture therein, and the grounds attached to such buildings necessary for the proper occupancy, use and enjoyment of the same and not leased or otherwise used with a view to profit; all public colleges, public academies, all buildings connected with the same, and all lands connected with public institutions of learning, not used with the view to profit. This provision shall not extend to leasehold estates of real property held under the authority of any college or university of learning in this state. Provided, nevertheless, that all leaseholds, or other estates or property whatsoever, real or personal, the rents, issues, profits and income of which have been, or hereafter shall be given to any city, town, village, school district or subdistrict in this state, exclusively for the use, endowment, or support of schools for the free education of youth without charge, are and shall be exempt from taxation so long as such property, or the rents, issues, profits and income thereof shall be used and applied exclusively for the support of free education by such city, town, village, district or subdistrict.

*Second.* [Cemeteries.]<sup>2</sup> All lands used exclusively as graveyards, or grounds for burying the dead, except such as are held by any person, persons, company or corporation, with a view to profit, or for the purpose of speculating in the sale thereof.

*Third.* [State and federal property.] All property, whether real or personal, belonging exclusively to the state or United States.



*Fourth.* [County buildings.] All buildings belonging to counties, used for holding courts, for jails, or for county offices, with the ground, not exceeding, in any county, ten acres, on which such buildings are erected.

*Fifth.* [Poor-houses.] All lands, houses and other buildings belonging to any county, township or town, used exclusively for the accommodation or support of the poor.

*Sixth.* [Public charities and armories.]<sup>3</sup> All buildings belonging to institution[s] of purely public charity, and all buildings belonging to and used exclusively for armory purposes by lawfully organized military organizations which are and shall continue to be fully armed and equipped at their own expense and by law made subject to all calls of the governor for troops in case of war, riot, insurrection or invasion together with the road [land] actually occupied by such institutions, and that owned and used as sites for such armory buildings of said military organizations not leased or otherwise used with a view to profit, and all moneys and credits appropriated solely to sustain and belonging exclusively to said institutions and military organizations.

*Seventh.* [Property used for extinguishing fires.] All fire-engines and other implements used to [for] the extinguishment of fires, with the buildings used exclusively for the safe-keeping thereof, and for the meeting of fire companies, whether belonging to any town or to any fire company organized therein.

*Eighth.* [Other public property.]<sup>4</sup> All market-houses, public squares or other public grounds, town, or township, houses or halls, used exclusively for public purposes, or erected by taxation for public purposes, notwithstanding some parts thereof may be leased under and by virtue of section 2566 of the Revised Statutes of Ohio, and all works, machinery, pipe-lines and fixtures belonging to any town and used exclusively for conveying water to such town, or for heating or lighting the same, and any unpaid taxes assessed against any property comprised in this subdivision, with any penalty thereon, is hereby remitted.

*Ninth.* [One hundred dollars of personal property.] Each individual residing in this state may deduct a sum not exceeding one hundred dollars as exempt from taxation, from the aggregate listed value of his taxable personal property of any kind of which such individual is the actual owner, except dogs.

*Tenth.* [Soldiers' monuments.] All funds raised and set apart for the purpose of building monuments to the fallen soldiers of this state, and all monuments and monumental buildings, when erected shall be forever exempt from taxation for any purposes whatever.<sup>5</sup> [91 v. 393, 216; 88 v. 95; 61 v. 39, § 3; S. & S. 761 (S. & C. 1440).]

(1) **Schools and churches.**—See *Gerke v. Purcell*, 25 O. S. 229; *State v. Cappelar*, 6 B. 339; *Comm'rs v. Mannix*, 11 B. 184; *Kendrick v. Farquhar*, 8 O. 189; *College v. State*, 19 O. 110.

(2) **Cemeteries.**—See *German Ev. Pr. Cem. v. Brooks*, 8 C. C. 439.

(3) **Public charities.**—For institutions of purely public character see *Gerke v. Purcell*, 25 O. S. 229; *Humphreys v. Little Sisters of the Poor*, 29 O. S. 201; *Lodge v. Hay-slip*, 23 O. S. 144; *Library Ass'n v. Pelton*, 36 O. S. 253; *Davis v. Camp Meeting Ass'n*, 57 O. S. 257.

(4) **Public property.**—Apparatus belonging to a city used for supplying gas to its citizens, is used for a public purpose and is exempt. *Toledo v. Hosler*, 54 O. S. 418.

For taxation of municipal property leased for more than four-

teen years, see *Zumstein v. Coal & Mining Co.*, 54 O. S., 264.

Property owned by a municipal corporation is not exempt from taxation unless it is used for municipal purposes, and this is true, although it is leased by the municipality and the money realized is applied to a public purpose. *Cincinnati v. Lewis*, 66 O. S. 49.

(5) **Exemptions strictly construed.**—Exemptions from taxation must be strictly construed. *Library Ass'n v. Pelton*, 36 O. S. 253, 258; *Sturges v. Carter*, 114 U. S. 521; *Lee v. Sturges*, 46 O. S. 153.

And an exemption does not relieve from a local assessment. *Lima v. Cemetery Ass'n*, 42 O. S. 128.

**Relief for property erroneously taxed** may be had under § 1038 R. S. *Butler v. Comm'rs*, 39 O. S. 169.

### 3. EQUALIZATION OF TAXES.

#### BOARD OF REVIEW FOR MUNICIPAL CORPORATIONS.

An act to provide for the appointment of a board of review for the equalization of real and personal property.

[Sec. 1.] [Upon application of county auditor, state board of appraisers and assessors, to appoint board of review for municipal corporation in county; number of members; qualifications; term; vacancies; removals.]<sup>1</sup> Upon the written application of the county auditor of any county to the state board of appraisers and assessors, for the appointment of a board of review for any municipal corporation of such county, for the equalization of real and personal property, moneys and credits within such municipal corporation, said board of appraisers and assessors may appoint said board of review, to be composed of three citizens, freeholders of such municipal corporation not more than two of whom shall belong to the same political party, one member of such board to be appointed for the term of one year, one member for the term of three years, and one member for the term of five years; and thereafter at the expiration of the term of any member, there shall be appointed by the said state board of appraisers and assessors, a freeholder of such municipal corporation as successor to such member for the term of five years, and all vacancies in said board shall be filled for the unexpired term in the same manner as the original appointment. The state board of appraisers and assessors may, at its discretion, remove any member of said board.

**[Powers and duties of board.]** Said board of review shall within and for their respective municipalities have all the powers and perform all of the duties heretofore conferred upon or required of the annual city board for the equalization of the value of real and personal property, moneys and credits; the decennial city board, for the equalization of the value of real property; and the annual city board of revision; and the decennial city board of revision, under any and all laws now in force; pertaining to such municipalities. And said board of review shall be the successor of said board of revision, said annual city board and said decennial city board, all of which boards shall, upon the appointment of a board of review in any municipal corporation under this act be abolished. Said board of review shall have power to hear complaints and to equalize the valuation of real and personal property, moneys and credits within such municipal corporation as said board of review may be located, and shall be governed by rules prescribed for the government of decennial county and city boards, and annual county and city boards, for the equalization of real and personal property. [95 v. 481.]

**[Sec. 2.] [Sessions of board.]** Said board of review shall meet annually at the office of the county auditor on the first Monday in June, and shall continue in session from day to day (except Sundays and legal holidays) until the Saturday preceding the first Monday in June of the following year; provided that the state board of appraisers and assessors shall have the authority to fix the time within which the work shall be completed. [95 v. 481.]

**[Sec. 3.] [Compensation of members; meetings, where held; clerks and other employes.]** The county commissioners shall fix the salary of the members of such board of review, which salary shall not be less than three dollars and fifty cents per day for each and every day the board shall be in session, and not to exceed two hundred and fifty (\$250.00) dollars per month for the time such board may be in session, which salary shall be payable monthly out of the county treasury upon the order of said board and the warrant of the county auditor:

And said board shall meet in rooms provided by the county commissioners, and shall, when in session, devote their entire time to the duties of their office, and no member thereof shall be engaged in any other business or employment during the period of time covered by the session of the board.

Said board shall have power to employ a chief clerk and appoint such other clerks, not exceeding six (6), such messengers, not exceeding six (6), as it may deem necessary, and fix their compensation, which shall be paid out of the county treasury upon the order of said board and the warrant of the



county auditor, and such incidental expenses as said board shall deem necessary, shall be paid out of the county treasury in like manner. [95 v. 481; 97 v. 313.]

[**Sec. 4.**] [**County auditor to be secretary of board; duties and compensation.**] The county auditor of any county in which any of such municipal corporations are located shall be secretary to such board, and shall in addition to his other duties provided by law, be present at each meeting of the board in person or by deputy; he shall keep a correct record of the proceedings of the board in a book to be kept for that purpose, and perform such other duties as the board may order, or as may be incident to his position. For his services as secretary to such board he shall receive out of the county treasury upon the order of the board five (\$5.00) dollars per day for each and every day the board shall be in session. [95 v. 481.]

[**Sec. 5.**] [**Repeals.**] All of the provisions of the Revised Statutes of the state of Ohio, are hereby repealed in so far as they conflict with or are inconsistent with the provisions of this act, and not otherwise.<sup>2</sup> [May 10, 1902, 95 v. 481.]

(1) **Powers and duties.**—See generally, notes to § 2805 R. S., *infra*, upon powers and duties of city boards of equalization; and see notes to § 2807 R. S., *infra*.

**Acts of unconstitutional board.**—In making addition to tax return cannot be collaterally attacked, in action to restrain collection of such

additional tax. McCormick Harvesting Machine Co. v. Sims, 14 Dec. 15.

(2) **Repeals.**—Sec. 2805 R. S., providing for annual boards of equalization was held to be repealed by this act. State v. Clarke, 68 O. S. 463; State *ex rel.* v. Godfrey, 25 C. C. 62.

## ANNUAL CITY BOARD OF EQUALIZATION.

**Sec. 2805 R. S.** [**How constituted and organized; compensation.**]<sup>1</sup> In each city of the first and second class there shall be an annual board for the equalization of the value of real and personal property, moneys, and credits in such city, to be composed of the county auditor and six citizens of such city, appointed by the council thereof, except in cities of the second grade, first class, where the mayor of such cities shall make such appointments, the first appointment to be two for one year, two for two years, and two for three years, except in cities in which such boards are already organized, when two shall be appointed for three years, and two shall be thereafter appointed annually for three years; and all vacancies shall be filled for the unexpired term provided, that the provisions of this act shall not affect any person or persons heretofore appointed, and now in office, during the time for which they shall have been appointed; but in cities of the second class, third grade *a*, and third grade *c*, said six members shall be appointed by the board of tax commissioners, and the appointment of said board shall be so made, and the vacancies shall be so filled,

that not more than three members thereof shall be of the same political party, faith and allegiance, the first appointments to be two for one year, two for two years, and two for three years, and all the vacancies shall be filled for the unexpired terms from persons of the same political faith as those whose terms shall have expired. Said boards shall have all the powers, and be governed by the rules, provisions, and limitations prescribed in the next preceding section,<sup>2</sup> for the annual county board; each member of said board is authorized to administer oaths, and said board is empowered to call persons before them, and examine them, under oath, in regard to their own or others' property, moneys, credits and investments, and the value thereof, and to equalize the value of real and personal property, moneys, credits, and investments within such cities, and to order any property, credit or investment to be placed on the duplicate for taxation, and fix the value thereof according to law, which has not been listed for taxation, and to increase the value of such property, moneys, credits and investments, as have in their judgment, been listed at less than their true value in money, and to reduce the value of such property, moneys, credits or investments as have been appraised above their true value in money, and shall annually meet at the office of the county auditor on the fourth Monday in May, except in cities of the first and second grade of the first class, when it shall meet on the fourth Monday in May, and shall close its session on or before the second Monday of September; except that in cities of the third grade of the first class, and in cities of the first and second grades of the second class and in cities of the second class, third grade *a*, and cities having a population of twenty thousand and over by the last federal census, and which have not been by ordinance advanced to a city of the second grade of the second class, said board shall close its session on or before the first Monday of August; and in cities of the third, third grade *c* and fourth grades of the second class, said board shall close its session on or before the fourth Monday of June then next following. For each day necessarily employed in the performance of their duties, the members of said board shall each receive, in cities of the first class, and in the first and second grades of the second class, and in cities of the second class, third grade *a*, and in cities having a population of twenty thousand and over, ascertained as aforesaid, and which have not been advanced to a city of the second grade of the second class, the sum of five dollars per day and in cities of the third grade third grade *c*, and fourth grade of the second class.



the sum of three dollars per day, and in cities of the third and fourth grades of the second class, not county seats, the members of such board shall receive, in addition to the sum of three dollars per day, ten cents per mile traveling expenses going to the said county seat; and in cities of the first class, first grade, the auditor shall receive no compensation as a member of the board, but the board may appoint all necessary messengers and clerks, not exceeding six of each, who shall receive three dollars per day for their services, for the time actually employed, which shall be paid out of the county treasury. The county auditor may act by his deputy or chief clerk in all city boards of equalization, and, in addition to the clerks herein authorized, the auditor of the county having a city of the first grade of the first class, shall appoint a clerk, who shall be styled the chief clerk of the board of equalization, at a salary of five dollars for each day's services performed; and such boards shall each have the same powers as are conferred upon annual county boards by the next preceding section, and upon complaint of the presiding officer thereof to the probate judge, the same proceedings shall be had against persons notified and neglecting or refusing to appear before them, or refusing to swear, or answer questions, as is provided in section two thousand seven hundred and eighty-three; and county solicitors, or, where there is no such office, the prosecuting attorney of the county shall act as the legal adviser and attorney for the county board, and the city solicitor of the city board of equalization; provided, however, that this act shall not be deemed to supersede, or in any manner affect section two of an act entitled "An act supplementary to and amendatory of title XII of the Revised Statutes of Ohio," passed March 26, 1891. [93 v. 618; 89 v. 21; 88 v. 177, 370; 87 v. 370; 86 v. 190, 192; 85 v. 173, 328; 83 v. 234; 79 v. 71; 78 v. 179; 77 v. 81, 182; Rev. Stat. 1880; 76 v. 95, § 2; (S. & S., 755).]

(1) **Powers and duties.**—See *State ex rel. v. Raine*, 47 O. S. 447; *State ex rel. v. Lewis*, 1 C. C. (N. S.) 56; 25 C. C. 227 (rev. 69 O. S. 578); *Lewis v. Kramer*, 69 O. S. 473.

The valuation fixed by the decennial board cannot be altered by the annual board except upon reasonable notice to all interested parties. *Phillips v. Hunter*, 9 C. C. 698; *Banking Co. v. Hubbard*, 22 C. C. 20.

A judgment pending on error should be returned at its true value, but if the annual board fixes it at

one-half its nominal value, in the absence of fraud, it is conclusive and the county auditor cannot add the difference between the value fixed and the nominal value, with the fifty per cent. *Sherard v. Lindsay*, 13 C. C. 315.

The board must act upon the evidence before it and not arbitrarily. *Rawson & Co. v. Schott*, 14 C. C. 94; *Black v. Hagerty*, 16 C. C. 255, 257; *McCormick Harvesting Machine Co. v. Sims*, 14 Dec. 15.

The powers of the city board are



statutory and must be strictly construed. *George Scott's Sons v. Raine*, 25 B. 154.

§§ 2805 and 2807 R. S. limit the board's authority for equalization of assessments of new structures to such as are returned for the current year by the assessor. *Gibson v. Zumstein*. 21 B. 318.

Where there is a change of condition it is within the discretion of the annual board to change the valuation. *Black v. Hagerty*, 16 C. C. 255.

But the state auditor cannot, save by appeal in manner provided by law. *Ib.*

He may, however, correct clerical errors. *Ib.*

A court of equity will not act upon allegations questioning the

motives and legality of the appointments of members of a board of equalization, as long as the board acts within its jurisdiction. *Cleveland Electric Ry. Co. v. Board of Equalization*, 8 N. P. 487.

Nor will a board be enjoined from increasing valuation because mayor appointed members who coincided with his views. As to power to increase valuations because of previous increases on other property, being invalidated by *Gaylord v. Hubbard*, 56 O. S. 25, see *Brooks v. Lander*, 13 Dec. 634.

**Validity.**—This act held constitutional. *Cleveland Elec. Ry. Co. v. Board of Equalization*, 8 N. P. 487.

**Section now superseded**, see note 2, p. 791.

(2) This refers to §§ 2804 and 2814 R. S. See *State ex rel. v. Raine*, 47 O. S. 447, 458.

**Sec. 2805—1 R. S.** [*Springfield improvements if assessed.*] § 5. In cities of the second class, third grade *a*, the provisions of section 2702, of the Revised Statutes of Ohio, shall not be held applicable in case of the improvement of public streets, alleys, avenues or spaces, or in the construction of sewers, sidewalks, curbs, or gutters, where the whole or any part of the cost of such improvement is to be assessed upon the abutting or other benefited lots and lands in such cities. [89 v. 23.]

**Sec. 2805—2 R. S.** [*Springfield improvements if contracted for.*] § 6. In cities of the second class, third grade *a*, the provisions of section 2702, Revised Statutes, shall not be held to apply to any of the improvements enumerated in section 5 [§(2805—1)] of this act which are now either contracted for or are now in process of construction. [89 v. 23.]

**Sec. 2805a R. S.** [*Power of the Cincinnati and Cleveland boards as boards of revision.*] And in each city of the first and second grade, class first, the county auditor may, whenever he may deem it necessary to, call together the annual city board of equalization on the first Monday of December of each year, and the said board when so called together, shall sit as a board of revision of such acts done by it as a board of equalization at the previous meeting thereof, as the county auditor may present to it for its revision. But before acting as a board of revision, the members thereof shall be sworn, by a competent officer, to a faithful discharge of their duties as such board, and any refunder, abatement, or change of value, which said board of revision may recommend to be made, shall be deemed and held

in a case of refunder or abatement, to be sufficient authority for the county auditor to issue his order of refunder or abatement, on the county treasurer, and in case of change of value, such recommendation of change by said board shall be deemed and held sufficient authority for said officer to enter the same in his book of additions and deductions, and all acts of the said board of revision shall be subject to an appeal, through the county auditor, to the auditor of the state; said board of revision shall have power to administer any oath which it may deem necessary to the proper discharge of its duties; it shall not continue in session for a longer time than four weeks. Public notice shall be given by the county auditor of each meeting of said board, and its members shall be paid the same amount per day, as when sitting as a board of equalization. [1888, April 10: 85 v. 173, 174; 83 v. 234, 235; 78 v. 179, 180; 77 v. 81, 82.]

**Sec. 2805b R. S. [Cleveland board; appointment and term of members.]** In cities of the second grade of the first class there shall be a board of equalization and assessment, to be composed of three members, electors of said city, not more than two of whom shall belong to the same political party, who shall be appointed by the probate judge, for the term of three years; provided, that at the first appointment, which shall be made on the fourth Monday of April after the passage of this act, or as soon thereafter as practicable, one of said members shall be appointed for one year, one for two years and one for three years, and annually thereafter one member shall be appointed for the term of three years; and all vacancies shall be filled by appointment for the unexpired term. The probate judge may, at discretion, remove any member of said board. [89 v. 283.]

**Sec. 2805c R. S. [Salary; bond; sessions, etc.]** The members of said board shall each receive a salary of twenty-five hundred dollars per annum, and shall give bond in the sum of five thousand dollars to the approval of the probate judge. They shall devote their whole time to the duties of their office and no member shall be engaged in any other business avocation or employment. The board shall hold daily sessions so far as practicable and a record of its proceedings shall be kept. [89 v. 283.]

**Sec. 2805d R. S. [Organization.]** The said board shall meet on the first Monday of May of each year and the member having the shortest time to serve, not holding his office by appointment to fill a vacancy, shall be president for the ensuing year. The county auditor shall be secretary of said board, and for

his services in that behalf shall receive a salary of six hundred dollars per annum in addition to any salary now provided by law. The auditor shall appoint, subject to the confirmation of the board, a chief clerk for said board, who shall receive a salary of fifteen hundred dollars per annum, and not to exceed three assistant clerks, who shall each receive a salary of seventy-five dollars per month, and shall prescribe their duties. The board shall appoint such number of messengers, not exceeding six, as may from time to time be required, who shall each receive three dollars per day for their services, for the time actually employed. Not more than one-half of said clerks or one-half of said messengers shall belong to the same political party. [89 v. 283.]

**Sec. 2805e R. S. [Assessors.] § 4.** In every city of the second grade of the first class the said board shall, annually, on or before the second Monday of April, appoint not exceeding forty assessors, not more than one-half of whom shall belong to the same political party, who shall hold their office for the term of one year, but may be removed by the board at its pleasure, and who shall each receive for his services a compensation of four dollars per day for each day actually employed in the performance of his duties; provided, that no assessor shall in any one year receive compensation for more than thirty-six days' service, except upon the order of the board and the approval of the county auditor. Said assessors shall have the same power and perform the same duties as are or may be provided by law with respect to township assessors, and said board shall assign such assessors to the different wards of such city, or it may divide such city into districts and assign them to such districts. All statements of statistics and the quadrennial enumerations required of township assessors shall be made and returned by the assessors appointed by said board, for the wards or districts to which they may be respectively assigned by the board. Each of said assessors shall give bond in the sum of one thousand dollars to the approval of the board. [89 v. 283.]

**Sec. 2805f R. S. [Equalization of valuation of real property in Cleveland.] § 5.** Unconstitutional. *Gaylord v. Hubbard*, 56 O. S. 25.

**Sec. 2805g R. S. [Certain powers given to board.] § 6.** The said board shall be the successor of, and, except as otherwise provided in this act, shall have all the powers and perform all the duties prescribed by law for the decennial board for the equalization of the value of the real property within such city,



of the annual board for the equalization of the value of real and personal property, moneys and credits in such city, and of the last named board as a board of revision; also of the board of tax commissioners in such city. Said decennial board for the equalization of the value of real property and said annual board for the equalization of the value of real and personal property, moneys and credits, and the board of tax commissioners, in cities of the second grade of the first class, are hereby abolished; and the city council may designate said board of equalization and assessment in place of appointing the board provided by section 2279 of the Revised Statutes, in which event said board shall have all the authority and perform all the duties provided by law for said equalizing board. [89 v. 283.]

**Sec. 2805h R. S. [Decennial assessment of real estate; other powers.]** § 7. The decennial assessment of real estate to be made in the year 1900 and every tenth year thereafter, as provided by law, shall, in cities of the second grade of the first class be made by said board, and for that purpose it may appoint in such decennial years, such numbers of assistants and at such compensation as the city council may approve. The said board shall have all the powers and perform all the duties now provided by law for the district assessors of real estate in such cities, who are hereby abolished, and all the provisions of sections 2789, 2790, 2791, 2792, 2793, 2798 and 2799 of the Revised Statutes pertaining to said district assessors of real property in such cities, shall apply to and govern said board; provided, that nothing herein contained shall require said board to divide such city into districts for the purpose of such assessment, and unless the context otherwise require, the term "district" in said sections of the Revised Statutes shall be construed as referring to such city; provided further, that the return of the amount, description and value of the real property subject to be listed for taxation in said city shall be delivered to the auditor of the county on or before the first Monday of November in each decennial year. [89 v. 283.]

**Sec. 2805i R. S. [Payment of salaries, etc.]** § 8. The salaries of the members of said board shall be paid out of the city treasury. All other salaries and compensation herein provided for, and any contingent expenses authorized by the county commissioners, shall be paid out of the county treasury. [89 v. 283.]

**Sec. 2805j R. S. [Rooms, etc.; official bonds.]** § 9. The county commissioners of the county in which any such city is located shall provide suitable and convenient rooms for the use of the board; and all stationery, printing and supplies needed by said board shall be furnished at the expense of the county. All official bonds required to be given by this act shall be filed with the county auditor. [89 v. 283.]

**Sec. 2805k R. S. [Penalty.]** § 10. Any member of said board who shall wilfully neglect or refuse to perform any duty enjoined on him by law, or who shall consent to or connive at any evasion of the provisions of law whereby any property required to be assessed shall be unlawfully exempted or the valuation thereof entered at less than its true value, shall, for every such neglect, refusal, consent or connivance, forfeit and pay not less than the sum of two hundred dollars nor more than one thousand dollars, to be recovered by action in the name of the state, and he shall also be forthwith removed from office. [89 v. 283.]

**Sec. 2805l R. S. [Annual board of equalization; appointment in Columbus.]** § 1. In cities of the first grade of the second class, the annual board for the equalization of the value of real and personal property, moneys and credits, in such cities, shall be composed of the county auditor and six citizens of such cities appointed by the mayor thereof, for the term of one year, three members of which board shall be appointed from each of the two leading political parties in such cities. [87 v. 336.]

**Sec. 2805m R. S. [Decennial board.]** § 2. In cities of the first grade of the second class, the decennial board for the equalization of the value of real property within such cities, shall be composed of the county auditor and six citizens of such cities, appointed by the mayor thereof, three members of which board shall be appointed from each of the two leading political parties in such cities. [87 v. 336.]

**Sec. 2805n R. S. [Powers and duties.]** § 3. Said boards shall have all the powers, and be governed by the rules, provisions and limitations, and perform the same duties as are, or may be prescribed by law, with respect to like boards in other cities; provided, that such annual city board of equalization shall close its session on or before the first Monday of August. [87 v. 336.]

**Sec. 2805o R. S. [Compensation.]** § 4. For each day necessarily employed in the performance of their duties, the members of said boards shall each receive the following compensa-

tion, to-wit: the members of said annual city board the sum of three dollars per day; the members of said decennial board, the sum of five dollars per day. [87 v. 336.]

#### DUTIES AND POWERS OF BOARDS.

**Sec. 2806 R. S.** [Duties of auditor and state board of equalization.] The county auditor shall lay before each of the above-named boards,<sup>1</sup> for the territory they respectively have jurisdiction over, the returns of the assessors for the current year, and such returns as are required to be made to the county auditor as is provided in section *two thousand seven hundred and forty-four* and also the valuation of the real estate as the same was entered on the duplicate of the preceding year, or as fixed by the state board of equalization, with such maps, returns, lists, abstracts and other papers that may be in the auditor's office pertinent to their duties, and each of said boards shall keep a regular journal of its proceedings,<sup>2</sup> which shall be deposited with the auditor.<sup>3</sup> [1883, March 9: 80 v. 54; 77 v. 191, 192; Rev. Stat. 1880; 56 v. 175, § 46; (S. & C. 1457).]

(1) This refers to both city and county boards.

(2) **Minutes conclusive as to action of board.**—The action of the board, as evidenced by its minutes, must be regarded as conclusive in the absence of fraud or mistake; nor is the case of *Fratz v. Mueller*

35 O. S. 397, in conflict with this statement. *Scott's Sons v. Raine*, 25 B. 154, 162.

(3) **Annexation.**—Territory annexed to a city prior to meeting of county board of equalization is equalized by city board. *State ex rel. v. Holmes*, 20 O. S. 474.

**Sec. 2807 R. S.** [Equalizing of assessments; deduction for destroyed personal property.] The said boards shall hear complaints and equalize the assessments of all personal property, moneys and credits, new entries and new structures<sup>1</sup> returned for the current year. by the township assessors and county auditors; and they shall have power to add to, or deduct from the valuation of personal property, or moneys or credits, of any person returned by the assessor or county auditor, or which may have been omitted by them, or to add other items upon such evidence as shall be satisfactory to the said boards<sup>2</sup> whether said return be made upon oath of each person or upon the valuation of the assessor or county auditor, but when any addition shall be ordered to be made to any list returned under oath, a statement of the facts upon which such addition was made, shall be entered on the journal of the boards.<sup>3</sup> Provided, that no such addition shall be made to such list returned under oath without the board having first given reasonable no-



tice <sup>4</sup> to the person or persons (if their residence be within the county) whose personal property is sought to be added to, or the valuation thereof increased, to appear before said board at a time and place to be fixed by said board, and show cause why such addition should not be made, or why such valuation should not be increased; and when any reduction shall be ordered to be made in the amount of personal property, or moneys or credits of any person, whether such return be made by such person or by the assessor or county auditor, a statement of the facts on which such reduction was made shall be entered on the journal of the boards. And such boards shall have power, whenever it is made to appear to their satisfaction that any personal property returned by the township assessors or county auditors, for the current year, has been destroyed by fire, flood, tornado or otherwise, after the second Monday in April and before the final adjournment of said boards, to deduct from the valuation of the personal property, or moneys or credits of the owner of such destroyed property so returned, the value of the personal property so destroyed. [92 v. 218; 83 v. 231; 80 v. 54; 77 v. 75, 76, 191, 192; Rev. Stat. 1880; 56 v. 175, § 46; (S. & C. 1457).]

(1) **New structures.** — New structures defined, see *State v. Lewis*, 20 C. C. 319; *Schindler v. Lewis*, 16 C. C. 348.

(2) **Board must act on evidence.** — Additions must be made on satisfactory evidence and not arbitrarily. *Fratz v. Mueller*, 35 O. S. 397; *Rawson & Co. v. Schott*, 14 C. C. 94; *Black v. Hagerty*, 16 C. C. 255, 257.

And the facts which concern the correctness and completeness of each separate item, which have been proved to the board by satisfactory evidence, must be stated clearly in the record, so that reviewing authorities may know upon what facts the board acted. *Hayes v. Yost*, 24 C. C. 18; *Ratterman v. Niehaus*, 4 C. C. 502.

And additions without evidence are unauthorized. *Wise v. Kromberg*, 3 B. 863.

Evidence must be acted on by majority of board. *Hirschman v. Fratz*, 7 B. 35.

But a board should act if it thinks the return is below true value, though no complaint is made. *State v. Sullivan*, 15 C. C. 333; *aff'd*, 58 O. S. 504.

And as a general rule, the decisions of officers charged with the duty of valuing property for taxation and equalizing valuations, are final and conclusive. *Wagoner v. Loomis*, 37 O. S. 571.

See further *Britton v. Baker*, 12 Dec. 107.

(3) **Statement of facts in journal.** — The provision in the statute "a statement of facts on which such addition is made shall be entered on the journal" is mandatory. *Fratz v. Mueller*, 35 O. S. 397; *Ratterman v. Niehaus et al.*, 4 C. C. 502.

(4) **Service of notice.** — Notice must be given to *all* parties interested before addition is made, and must be served personally and proof made to that effect. Simply mailing letter containing notice is not sufficient. *Hayes v. Yost*, 24 C. C. 18. See also *Moore v. Given*, 39 O. S. 661; *Perkins Zumstein*, 4 C. C. 371.

**When notice not required.** — Notice required by § 2807 R. S. is not necessary in the case of new structures. *Schindler v. Lewis*, 16 C. C. 348; *Scott's Sons v. Raine*, 25 B. 154, 157.

The addition of a new item by the board and an order to the auditor to place it on the duplicate is not a levy. *Jones v. Davis*, 35 O. S. 474, 479.

### DECENNIAL CITY BOARD.<sup>1</sup>

#### **Sec. 2815 R. S. [City board: how constituted and organized.]**

In each city of the first and second class there shall be a decennial board for the equalization of the value of the real property within such city, to be composed of the county auditor, and six citizens of such city, appointed by the council thereof, except that in cities of the first grade of the first class, said six members shall be appointed by the city comptroller of such city, and shall consist of three members of each of the two leading political parties.

Said board shall convene at the office of the county auditor, on the first Monday of August, in the year one thousand nine hundred, and every tenth year thereafter, and shall close its session on or before the third Monday in October then next following; and they shall severally take the same oath<sup>2</sup> as that prescribed for the decennial county board; and a record of the proceedings and orders of said decennial city board of equalization shall be kept by the auditor. [94 v. 337; 93 v. 619; 88 v. 178; 87 v. 334; 77 v. 73; R. S. of 1880; 65 v. 166, § 40 (S. & S. 753).]

(1) For an act relating to compensation of decennial city boards in Cincinnati and Cleveland for a certain period of service, see 95 O. L. 3.

**Constitutionality.** — See *Scarborough v. Gibson*, 13 Dec. 738; 1 N. P. (N. S.) 77 (aff'd, 69 O. S. 578).

(2) **Oath.** — The members of a board of review, having taken the oath of office are not required to take another oath when acting as decennial board of equalization. *N. C. Harmony Lodge v. Hagerty*, 28 B. 67.

**Sec. 2816 R. S. [Powers; clerks; compensation.]** The said board shall as to the real estate within such city, have the same powers, perform the same duties, and be governed by the same rules, provisions and limitations as the decennial county board of equalization,<sup>1</sup> and in cities of the first grade of the first class, said board may appoint a chief clerk who shall be entitled to receive for each day necessarily employed in the performance of his duties a sum not exceeding four dollars, to be paid out of the county treasury, after the same has been approved by the county commissioners; said board may also employ such other clerks as may be necessary, who shall be entitled to receive not exceeding four dollars per day each for the time necessarily employed, to be paid out of the county treasury. [87 v. 338; 65 v. 166, § 40; S. & S. 753.]

(1) **Powers.** — See *N. C. Harmony Lodge v. Hagerty*, 28 B. 67, 71.

City decennial board of revision is not forbidden by § 2814 from

increasing the grand total of a decennial appraisalment, as fixed by city decennial board of equalization. *Scarborough v. Gibson*, 13 Dec. 738 (aff'd, 69 O. S. 578).

## XX

## INTOXICATING LIQUORS.

## 1. DISTRIBUTION OF DOW TAX.

**Sec. 4364—17 R. S. [Distribution of tax under Dow Law.]**

§ 9. That the revenues and fines resulting under the provisions of this act<sup>1</sup> shall be distributed as follows,<sup>2</sup> to-wit: In every county three-tenths of the money paid, as herein provided; into the county treasury on account of any business aforesaid, carried on in any city, village, hamlet or township therein, shall be passed to the credit of the general revenue fund of the state and paid into the state treasury by the county treasurer, as is provided in other cases; five-tenths of the money so paid, shall, upon the warrant of the county auditor, be paid on account of any business aforesaid, carried on in any such municipal corporation or township into the treasury of said corporation or township, one-half to the credit of the police fund, and one-half to the credit of the general revenue fund thereof; provided, in corporations having no police fund the entire five-tenths shall be passed to the credit of the general revenue fund thereof, and in townships having no police fund, said one-half of five-tenths shall be passed to the credit of the poor funds thereof; and the remaining two-tenths part thereof, together with all other revenues resulting hereunder in said county, shall be passed to the credit of the poor fund of said county; provided, that in all counties in which there is no county infirmary said remaining two-tenths part thereof shall be passed to the credit of the infirmary fund or the poor fund of the township, village or city in which the same shall have been collected; and in such counties, when the money is paid on account of any business carried on in any township outside of any such municipal corporation, said five-tenths, also, shall be passed to the credit of the infirmary fund or the poor fund of said township;

[Hamilton county.] And provided, that in counties having a city of the first grade of the first class with a city infirmary and a county infirmary, the above two-tenths part shall be



divided as follows: The city infirmary fund shall have passed to its credit two-tenths of all the money so paid in said city of the first grade of the first class; the county infirmary fund shall have passed to its credit two-tenths of all the money so paid in by any village, hamlet or township in said county, outside of said city of the first grade of the first class; and the the above five-tenths part of all the money so paid in by any township, outside of any municipal corporation, shall be paid into the treasury of such township, to be distributed by the order of the trustees of said township to the general revenue fund and poor relief fund, in such proportions as said trustees may deem proper. [93 v. 37; 92 v. 34; 87 v. 357; 85 v. 117; 83 v. 157.]

(1) **Dow law.**—The act referred to is the "Dow Law" of which this section is a part. must be paid over by the treasurer according to law. *Ratterman v. State*, 44 O. S. 641; see also *Frame v. State*, 53 O. S. 311.

(2) **Money how distributed.**—Money collected under Dow law

[Sec. 9a.] [Disposal of surplus Dow tax.] All moneys passed to the credit of any city infirmary fund, under the provisions of the section to which this is supplementary, and all moneys placed to the credit of such fund from any other source whatsoever, not used for the support, maintenance and operation of such infirmary during any fiscal year ending December 31st, shall be placed by the auditor of the city to the credit of and for the use of the police department of such city. [97 v. 286.]

## 2. BEAL LOCAL OPTION LAW.<sup>1</sup>

**Sec. 4364—20 R. S. [Closing of saloons on Sunday.]** [§ 1.] That the sale<sup>2</sup> of intoxicating liquors, whether distilled, malt or vinous, on the first day of the week, commonly called Sunday, except by a regular druggist on a written prescription of a regular practicing physician for medical purposes only, is hereby declared to be unlawful, and all places where such intoxicating liquors are on other days sold or exposed for sale, except regular drug stores, shall on that day be closed,<sup>3</sup> and whoever makes any such sales, or allows any such place to be open or remain open on that day shall be fined in any sum not exceeding one hundred dollars and not less than twenty-five dollars for the first offense, and for each subsequent offense shall be fined not more than two hundred dollars or be imprisoned in the county jail or city prison not less than ten days and not exceeding thirty days, or both.<sup>4</sup>

[**Hotels and eating houses.**] In regular hotels and eating houses<sup>5</sup> the word "place" herein used shall be held to mean the room or part of room where such liquors are usually sold or exposed for sale and the keeping of such a room or part of room securely closed shall be held, as to such hotels and eating houses as a closing of the place, within the meaning of this section.

[**Municipal regulations.**] And any municipal corporation shall have full power to regulate<sup>6</sup> the selling, furnishing or giving away of intoxicating liquors as a beverage and places where intoxicating liquors are sold, furnished or given away as a "beverage," except as provided for in section 4364-20c of this act. [1902, April 3: 95 v. 87.]

(1) **Beal local option law.**— §§ (4364-20) to § (4364-20i) constitute the Beal Local Option law, passed April 3, 1902. For reference to this act in the new Code, see par. 5, § 7, page 47.

**Validity.**—The Beal law was held constitutional in *Lloyd v. Dollison*, 23 C. C. 571; 3 C. C. (N. S.) 328 (aff'd, 68 O. S. 688); (U. S. Sup. Ct., 3 O. L. R. 23; 14 O. F. D. 380).

As to validity of former § 4364-20 R. S., see *Madden v. Smeltz*, 2 C. C. 168; *Van Wert v. Brown*, 47 O. S. 477.

(2) **Sale** within the meaning of this act is defined in *Kaufman v. Hillsboro*, 45 O. S. 700.

Single sale, otherwise than as allowed, is a violation. *Belle Centre v. Welsh*, 24 B. 176; *Volk v. Westerville*. 3 N. P. (N. S.) 241.

Several sales may be charged in one affidavit and a fine assessed for each offense, even though aggregate exceeds limit of fine for one offense. *Kubach v. State*, 25 C. C. 488; 2 C. C. (N. S.) 133.

As to allegations and proof of sale, see *Monte v. Pabst*, 14 Dec. 97; *Kappes v. State*, 25 C. C. 723;

4 C. C. (N. S.) 14; *Oberer v. State*, 8 C. C. (N. S.) 93; *Bromley v. Euclid*, 15 Dec. 155; 2 N. P. (N. S.) 508.

(3) **Place must be closed** and not merely the business, and failure to close the place is an infraction of this section. *State v. Heibel*, 54 O. S. 321. See also *Effinger v. State*, 9 C. C. 377.

Covering the beer pumps and separating the bar by a wire screen do not render the serving of meals in the place on Sunday lawful. *Lederer v. State*, 5 C. C. 623.

(4) **Jurisdiction, trial, etc.**— See notes under § 4364-20b, *infra*.

(5) **"Regular hotels and eating houses"** do not include saloons where meals are served, the serving of meals being subordinate and not the principal business. *Lederer v. State*, 5 C. C. 623.

(6) **Power of councils to regulate.**—See paragraph 5, § 7 of the Code and notes, page 47, *et seq.*

The provisions of this section may be enforced by a penalty which council may prescribe by ordinance. *Alliance v. Joyce*, 49 O. S. 7. See also as to power of councils, *Madden v. Smeltz*, 2 C. C. 168.

**Sec. 4364—20a R. S. [Petition for an election on saloon question; special election to be held; notice and conduct of election]** That whenever forty per cent. of the qualified electors of any municipal corporation shall petition the council thereof for the privilege to determine by ballot whether the sale of intoxicating liquors as a beverage shall be prohibited within the limits of

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such municipal corporation, such council shall order a special election to be held in not less than twenty nor more than thirty days from the filing of such petition with the mayor of the municipal corporation or from the presentation of such petition to said council, which said petition shall be filed as a public document with the clerk of the municipality, and preserved for reference and inspection and which election shall be held at the usual place or places for holding municipal elections, and notice shall be given and the election conducted in all respects as provided by law for the election of members of the council of the corporation, so far as said law may be applicable.<sup>1</sup>

[**Record of result of election; its value as evidence.**] The result of such election shall forthwith be entered upon the record of the proceedings of the council of the corporation by the clerk thereof, and in all trials for violation of this act, the original entry of the record, or a copy thereof certified by the clerk of the corporation, provided that said record shows that a majority of the votes cast at said election was against the sale of intoxicating liquors as a beverage, shall be prima facie evidence that the selling, furnishing or giving away of intoxicating liquors as a beverage or the keeping of a place where such liquors are sold, kept for sale, given away or furnished, if such selling, furnishing or giving away or keeping such place occurred after thirty days from the day of holding the election, was then and there prohibited and unlawful.<sup>2</sup> [1902, April 3, 95 v. 87.]

(1) **Petition.**—That forty per cent. of voters have signed petition must affirmatively appear before council can order election; it will not be presumed because council has ordered election. *In re* Huntsville Local Option Election, 25 C. C. 535; 1 C. C. (N. S.) 489; if it does affirmatively appear, the record will be presumed to be regular. *Ib.* *Dalrymple v. State*, 26 C. C. 562; 5 C. C. (N. S.) 185.

**Number of electors.**—Forty per cent. of those who cast votes at last preceding election sufficient. *In re* South Charleston Election, 3 N. P. (N. S.) 373; 50 B. 173.

**Withdrawal of names from petition for Beal law election** is allowable at any time before the election is ordered; and if enough names have been withdrawn to reduce the number of signers below that required, election cannot be ordered. *Haynes v. Hillsboro*, 3 N. P. (N. S.) 17; 50 B. 236.

**Applies to hamlets before new**

**code.**—This section making provision for election applies to hamlets existing before new Code. *Carey v. State*, 70 O. S. 121.

**Resolution of council ordering election under the Beal Law** need not be read on three different days, but three readings may be had at one time. *Kumpf v. Delhi*, 1 N. P. (N. S.) 336.

**Publication of notice for a period less than ten days** required by statute is not fatal to validity of election. *Fike v. State*, 25 C. C. 554.

(2) **Collateral attack.**—Validity of special election cannot be collaterally impeached by defendant indicted for sale contrary to law. *Fike v. State*, 25 C. C. 554. But see *Stick v. State*, 3 C. C. (N. S.) 611; 23 C. C. 393, where it is held state must show beyond reasonable doubt that election was valid.

Failure of clerk to record the result of the election, as required, does not invalidate the election, if the election and result thereof can



be established by other evidence. 5 C. C. (N. S.) 185.  
Dalrymple v. State, 26 C. C. 562;

**Sec. 4364—20b R. S. [Ballots to be voted at such election.]**  
The ballots at any special election, held under the provisions of this act, shall be printed with an affirmative and a negative statement, to-wit: "The sale of intoxicating liquors as a beverage shall be prohibited," "The sale of intoxicating liquors as a beverage shall not be prohibited," with a blank space on the left side of each statement in which to give each elector an opportunity to clearly designate his choice by a cross mark as follows:

(.....) The sale of intoxicating liquors as a beverage shall be prohibited.

(.....) The sale of intoxicating liquors as a beverage shall not be prohibited.<sup>1</sup>

**[When the sale in any municipality shall be unlawful; penalty for making such prohibited sale.]** And if a majority of the votes cast at such election shall be in favor of prohibiting the sale of intoxicating liquors as a beverage, then from and after thirty days from the date of holding said election it shall be unlawful for any person, personally or by agent, within the limits of such municipal corporation to sell, furnish or give away any intoxicating liquors to be used as a beverage, or to keep a place where such liquors are kept for sale, given away or furnished, for beverage purposes, and whoever from and after the thirty days aforesaid in any manner directly or indirectly, sells, furnishes, or gives away, or otherwise deals in any intoxicating liquors as a beverage, or keeps or uses a place, structure or vehicle, either permanent or transient for such selling, furnishing or giving away or in which or from which intoxicating liquors are sold, given away or furnished or otherwise dealt in as aforesaid, shall be guilty of a misdemeanor, and shall on conviction thereof, be fined not more than two hundred dollars nor less than fifty dollars for the first offense, and shall for a second offense be fined not more than five hundred dollars nor less than one hundred dollars, and for any subsequent offense be fined not less than two hundred dollars and be imprisoned not more than sixty days and not less than ten days.<sup>2</sup>

**[Manufacturers may sell at wholesale to retail dealers.]**  
But nothing contained in any of the sections of this act shall in any manner affect the right of any manufacturer of intoxicating liquors from the raw material, to sell, deliver and furnish his product in wholesale quantities to bona fide retail dealers trafficking in intoxicating liquors, or in wholesale quantities to any party or parties residing outside the limits of said municipality. [1902, April 3: 95 v. 87.]

(1) **Ballots.**—Form of. See *In re South Charleston Election*, 3 N. P. (N. S.) 373; 50 B. 173.

What ballots counted. See *Jackson v. Washington*, 3 N. P. (N. S.) 453.

(2) **Municipality prohibiting sale, effect on Dow tax.**—Where intoxicating liquors were sold in violation of a municipal ordinance, passed under § 11 of the Dow law, it was held that the tax authorized by that law could, nevertheless, be collected. *Conwell v. Sears*, 65 O. S. 49.

**Corporation not indictable for unlawful sale.** *Ebbert Brew. Co. v. State*, 25 C. C. 601.

**Court.**—Mayor has final jurisdiction to try one accused under the Beal Law, whether trial is for first or second offense. *Kappes v. State*, 25 C. C. 723; *Wells v. State*, 14 Dec. 196; 1 N. P. (N. S.) 309; *Dominick v. State*, 27 C. C. 305; 6 C. C. (N. S.) 192.

**Jury.**—Offense may be tried by a jury of the county, and it is not necessary that jurors should be selected from municipality alone in which violation of the statute occurred. *Lloyd v. Dollisin*, 23 C. C. 571; 3 C. C. (N. S.) 328 (aff'd, 68 O. S. 688).

Trial may be had without a jury, where the penalty is a fine only. *Wells v. State*, 1 N. P. (N. S.) 309; *Harlow v. State*, 1 N. P. (N. S.) 323; 14 Dec. 196; *Kubach v. State*, 2 C. C. (N. S.) 133; 25 C. C. 488; *Kappes v. State*, 25 C. C. 723.

Imprisonment imposed to enforce payment of fine is not part of penalty, and jury trial is not necessary where this is the case. *Schlagel v. State*, 16 Dec. 295; 3 N. P. (N. S.) 429 (aff'd Cir. Ct. without rep.).

**Sufficiency of affidavit, etc.**—In prosecutions founded on affidavit, information or indictment for selling intoxicating liquors to be used as a beverage, in violation of §§ 4364-20b and 4364-20c, it is necessary to allege in the affidavit, information or indictment, the name of the purchaser of such liquors, or that his name is to the affiant, in-

formant, or grand jury unknown. *State v. Ridgway*, 73 O. S. 31; see also *Stewart v. State*, 25 C. C. 438; 2 C. C. (N. S.) 290. But see *Dalrymple v. State*, 26 C. C. 562; 5 C. C. (N. S.) 185.

Where the affidavit does not show that the offense was a second or third offense, it will be presumed to be a first offense. *Harlow v. State*, 1 N. P. (N. S.) 323.

An affidavit must show former conviction to charge second offense. *Kubach v. State*, 2 C. C. (N. S.) 133; 25 C. C. 488.

Where affidavit alleges sale and keeping a place where sale is made, state is not bound to elect one or the other charge, since keeping a place where sale is made involves sale. *Ib.*; *Kappes v. State*, 25 C. C. 723; 4 C. C. (N. S.) 14; but see *Dominick v. State*, 27 C. C. 305; 6 C. C. (N. S.) 192.

Where one count charges defendant with keeping a place where intoxicating liquors are sold in violation of § 4364-20b and another count charges the same in violation of § 6942, each count covering the same period of time and the defendant kept but one place, there is but one offense. *Weaver v. State*, 74 O. S. — (51 B. 77).

As to necessity of negative averment that defendant does not come within exception named in statute, see *Schlagel v. State*, 16 Dec. 295; 3 N. P. (N. S.) 429 (aff'd Cir. Ct.).

Affidavit is not demurrable which alleges the acts complained of to be then and there prohibited and unlawful. *Kappes v. State*, *supra*.

**New trial and bill of exceptions.**—See notes under § 1752 R. S., p. 543, and *Harlow v. State*, 1 N. P. (N. S.) 323, as modified, 1 O. L. R. 751.

**Fine** provided by Beal Law is not within constitutional inhibition, as excessive. *Wells v. State*, 1 N. P. (N. S.) 309; 14 Dec. 196.

Fine of \$100.00 on each of three counts of an affidavit is excessive for first offense. *Dalrymple v. State*, 26 C. C. 562; 5 C. C. (N. S.) 185; *Carey v. State*, 70 O. S. 121.

**Sec. 4364—20c R. S.** [Meaning of phrase "intoxicating liquors"; regular druggists.] The phrase "intoxicating liquors" as used in this act shall be construed to mean any dis-

tilled, malt, vinous or any other intoxicating liquors; but nothing in this act shall be construed to prevent the selling of intoxicating liquors at retail by a regular druggist for exclusively known medicinal, pharmaceutical, scientific, mechanical or sacramental purposes; and when sold for medicinal purposes it shall be sold only in good faith upon written prescription issued, signed and dated in good faith by a reputable physician in active practice and the prescription used but once. The words "giving away" where they occur in this act shall not apply to the giving away of intoxicating liquors by a person in his private dwelling, unless such private dwelling is a place of public resort.

**Sec. 4364—20d R. S. [Rebate of Dow tax when sale discontinued.]** When any person, company or corporation has discontinued such traffic in accordance with the provisions of this act, within the time specified by section 4364-20a of this act, has paid or is charged upon the tax duplicate with an assessment upon such traffic, the county auditor, upon being satisfied of such fact, shall issue to such person, company or corporation, a refunding order of an amount proportionate to the unexpired time for which said assessment has been paid. [1902, April 3: 95 v. 87.]

**Sec. 4364—20e R. S. [What constitutes forty per cent. of the qualified electors; sufficiency of indictments under this act.]** The petition for an election provided for in section 4364-20a of this act shall be deemed sufficient and the council shall order such an election when the petition is signed by as many qualified electors as shall equal in number forty per cent. of the number of votes cast in said municipal corporation at the last preceding general election in municipalities which are divided into wards; and in all other municipalities, forty per cent. of the qualified electors at the last preceding municipal election, and in indictments, affidavits, or informations for violation of this act it shall not be necessary to set forth the facts showing that the required number of electors in the municipal corporation petitioned for an election, that the election was held, or that the majority voted in favor of prohibiting the sale as herein provided. But it shall be sufficient to state that the act complained of was then and there prohibited and unlawful.

**Sec. 4364—20f R. S. [Entry and record of result of election required by Sec. 4364—20a.]** The following shall be deemed a sufficient entry and record of the result of an election held under the provisions of this act as required by sections 4364-20a and 4364-20b:

The State of Ohio, County of....., municipal corporation of .....



The special election held on the.....day of.....  
 ....., A. D., ....., within and for the (municipal  
 corporation of.....) under the local option law re-  
 sulted as follows:

Whole number of votes "for the sale of intoxicating liquors  
 as a beverage".....

Whole number of votes "against the sale of intoxicating  
 liquors as a beverage".....

Clerk of.....

**Sec. 4364—20g R. S. [Disposition of fines.]** Money received from fines and forfeited bonds collected under the provisions of this act shall be paid into the treasury of the municipal corporation wherein said fine was imposed or bond forfeited, and shall be applied to such fund or funds as the council of the said corporation may direct.

**Sec. 4364—20h R. S. [Another election may be ordered; when.]** At any time after two years from the date of an election held under the provisions of section 4364-20a of this act another election may be petitioned for and shall be ordered as provided for in section 4364-20a.

**Sec. 4364—20i R. S. [Contest of election in probate court.]** Any person being a qualified elector of any municipal corporation wherein an election shall have been held as provided for in this act may contest the validity of such election by filing a petition duly verified with the probate court of the county in which such municipal corporation is situated, within ten days after the election, setting forth the grounds for contest.

**[Mayor shall be summoned.]** The probate judge, upon the filing of such petition, shall forthwith issue a summons, addressed to the mayor of such municipal corporation, notifying him of the filing of such petition and directing him to appear in said court on behalf of said municipal corporation, at a time named in the summons, which time shall be not more than twenty days after the election nor less than five days after the filing of such petition.

**[Method of procedure.]** The probate judge shall have final jurisdiction to hear and determine the merits of the proceedings, and in other respects in the procedure of the hearing he shall be governed by the law providing for the contesting of an election of a justice of the peace so far as such law is applicable. The probate court shall require the person or persons contesting the election to furnish sufficient security for costs before said petition is filed.<sup>1</sup> [April 3, 95 v. 87.]

(1) **Scope of hearing.**—The probate judge is limited to an investigation of the regularity of the election and conformity to the statute, and has no jurisdiction to pass upon the validity of the statute. *Wells v. State*, 1 N. P. (N. S.) 309.

But see *Rost v. Glenville*, 1 N. P. (N. S.) 65.

**Remedy exclusive.**—Method of contesting election here provided is exclusive and question cannot be raised by defendant in criminal prosecution. *Fike v. State*, 25 C. C. 554; 4 C. C. (N. S.) 81.

[Sec. 2.] [Repeals and saving clause for ordinances.] That section 4364-20 of the Revised Statutes of Ohio be and the same is hereby repealed, but an ordinance passed by a municipal corporation under the authority given in said section prohibiting places where intoxicating liquors are sold at retail shall remain in full force and effect until thirty days after an election has been held in accordance with the provisions of section 4364-20a of this act. An ordinance passed by a municipal corporation under the authority given in said section regulating places where intoxicating liquors are sold at retail, shall remain in full force and effect until said ordinance is repealed or amended under the authority granted in section 4364-20 of this act. [1902, April 3, 95 v. 87.]

### 3. RESIDENCE DISTRICT OPTION LAW.

An act to further provide against the evils resulting from the traffic in intoxicating liquors by providing for local option in residence districts of municipal corporations.<sup>1</sup>

[Sec. 1.] [Petition to prohibit sale of intoxicating liquor in residence district; filing and examination of.] Whenever a majority of the qualified electors of any residence district of any municipal corporation sign a petition in favor of prohibiting the sale of intoxicating liquors as a beverage in such residence district and file the petition with the mayor of the municipal corporation or with any judge of the court of common pleas of the county in which such municipal corporation is situated, the mayor or judge shall examine the petition at a public hearing and decide upon the sufficiency of the petition and cause a copy of his decision to be filed with the clerk of the municipal corporation or council.<sup>1</sup>

[Record of decision of mayor or judge; its value as evidence.] The decision of the mayor or judge, as certified to the clerk of the municipal corporation or council and recorded by him in the records of the council of the corporation, or a certified copy thereof, provided it shows that a majority of the voters of such residence district were in favor of prohibiting the sale of intoxicating liquors as a beverage, shall be prima

facie evidence that the selling, furnishing or giving away of intoxicating liquors as a beverage or the keeping of a place where such liquors are sold, kept for sale, furnished or given away, if such selling, furnishing or giving away or keeping of such place occurred thirty days after the finding by said mayor or judge, was then and there prohibited and unlawful. [1906, April 4, 98 v. 68; 97 v. 87, § 1.]

(1) **Validity.**—The former Brannock Law was held constitutional. *Columbus v. Jeffrey*, 14 Dec. 609; 2 N. P. (N. S.) 85; 4 C. C. (N. S.) 494; *Ely v. Willard*, 15 Dec. 318.

**Character of petition**, under former Brannock law, as a public document, see *Krickenberg v. Wilson*, 15 Dec. 779.

For construction of provisions relating to election under former Brannock Law, see *In re Petition*

for Election, 14 Dec. 561; 2 N. P. (N. S.) 245; *In re Petition for Election in Toledo*, 14 Dec. 698; 2 N. P. (N. S.) 469; *Jeffrey v. State*, 26 C. C. 591; 4 C. C. (N. S.) 494; *In re Petition of Ammer*, 3 N. P. (N. S.) 329; *Fulton v. Columbus*, 16 Dec. 129; 3 N. P. (N. S.) 358; *Columbus v. Cole*, 16 Dec. 212; 2 N. P. (N. S.) 563; *In re Petition for Election in Dayton*, 2 N. P. (N. S.) 245.

[**Sec. 2.**] [**Petition against prohibition of sale of intoxicating liquor in residence district; filing and examination of.**] Whenever a majority of the qualified electors of any residence district of any municipal corporation in which the sale of intoxicating liquors as a beverage has been prohibited under the provisions of section one of this act, shall sign a petition against prohibiting the sale of intoxicating liquors as a beverage in the same residence district and file the petition with the mayor of the municipal corporation or with any judge of the court of common pleas in the county, the mayor or judge shall examine the petition at a public hearing and decide upon the sufficiency of the petition and cause a copy of his decision to be filed with the clerk of the municipal corporation or council.

[**Record of decision of mayor or judge; its value as evidence.**] The result of such examination and the finding duly certified by the judge or mayor and recorded by the clerk of the municipal corporation or council in the records of the proceedings of the council of the corporation, provided that it shows that a majority of the voters of the residence district are opposed to prohibiting the sale of intoxicating liquors as a beverage, shall be prima facie evidence that the sale of intoxicating liquors as a beverage in the residence district is not then and there prohibited.

[**When such petition may be filed.**] The petition provided for in this section shall not be filed until after two years or more shall have elapsed after the filing of the petition provided for in section one of this act. Nothing in this act shall be construed to affect or repeal any other law which prohibits the selling, furnishing or giving away of intoxicating liquor as a



beverage, or the keeping of a place where intoxicating liquor is sold, furnished or given away as a beverage which is in force and effect throughout the municipal corporation.<sup>1</sup> [1906, April 4, 98 v. 68; 97 v. 91, § 9.]

(1) **Construction** of former section of Brannock Law, see Columbus v. Jeffrey, 14 Dec. 600; 2 N. P. (N. S.) 85; 4 C. C. (N. S.) 494.

[**Sec. 3.**] [**Form of petition.**] A petition in favor of prohibiting the sale of intoxicating liquor as a beverage in a residence district substantially as follows shall be sufficient:

"A petition to prohibit the sale of intoxicating liquors as a beverage in a residence district of the municipal corporation of..... in the state of Ohio.

To..... Date.....

We, the undersigned, respectfully represent that we are qualified electors in the following residence district, to-wit:

.....  
.....  
in the municipal corporation of....., county of  
....., state of Ohio, and that we are in favor of  
prohibiting the sale of intoxicating liquors as a beverage in  
said residence district."

A petition against prohibiting the sale of intoxicating liquors as a beverage in a residence district substantially as follows will be sufficient:

"A petition against prohibiting the sale of intoxicating liquors as a beverage in a residence district of the municipal corporation of.....of the state of Ohio.

To..... Date.....

We, the undersigned, respectfully represent that we are qualified electors in the following residence district, to-wit:

.....  
.....  
in the municipal corporation of....., in the  
county of....., state of Ohio, and we are  
opposed to prohibiting the sale of intoxicating liquors as a  
beverage in said residence district."

Any qualified elector may authorize any person to sign the petition for him by a written power of attorney. No elector will be allowed to add his name to the petition after it is filed or withdraw his own or authorized signature from the petition unless he can prove to the mayor or judge that it was secured through fraud or misrepresentation.<sup>1</sup> The petition provided for in this act shall be deemed sufficient when it is signed by as many qualified electors as equal a majority in number of the votes cast at the last regular municipal election in such residence district, but must in order to be valid, be filed not

later than three months after the signing thereto of the signature first in order of time.<sup>2</sup> The expense incurred for the publication of notices for the hearing on the petition shall be paid out of the general revenue fund of the municipal corporation upon the order of the mayor or judge passing upon the petition. [1906, April 4, 98 v. 69; 97 v. 88, § 3.]

(1) **Withdrawal of names,** under former law, see *In re* Petition for Election in Toledo, 14 Dec. 698; *Columbus v. Glackin*, 16 Dec. 229; 3 N. P. (N. S.) 356; *Columbus v. Cole*, 2 N. P. (N. S.) 563.

(2) **Sufficiency of petition.**—What names counted, under former Brannock law, see *In re* Petition for Election in Toledo, 14 Dec. 698; *In re* Petition of Wightman, 3 N. P. (N. S.) 129; 50 B. 375.

[**Sec. 4.] [Public hearing for consideration of petition.]** When the petition referred to in this act has been filed with the mayor of the municipal corporation or with any judge of the court of common pleas in the county, the mayor or judge shall forthwith cause a notice of the hearing on such petition to be published in two newspapers of opposite party politics published in the municipal corporation, if there be two, which notice shall set forth the time when and place where the judge or mayor will consider the petition, at which time he shall hear any person or persons who are electors of the district as to the question of the petitioners being qualified electors in the residence district or any other matter which may be brought before the mayor or judge for determination relating to the sufficiency of the petition. The mayor or judge shall decide whether the petitioners are qualified electors in the residence district and equal in number a majority of the votes cast in the residence district at the last regular municipal election and the mayor shall make a record of his findings on his docket and the judge shall cause the same to be recorded in the records of his court, and thereupon such mayor or judge shall cause a certified copy or certificate of his findings together with the original petition to be filed with the clerk of the municipal corporation or council in not less than five days after such finding and not more than forty days from the filing of the petition with the mayor or judge.

[**Certificate of finding of mayor or judge.**] The following shall be a sufficient certificate of the finding of the mayor or judge:

“This is to certify that I have examined the petition which is attached hereto, at a public hearing duly announced and hereby find that on the.....day of.....A. D. ...., that the petition meets the requirements of the law and that a majority of the voters of the following residence district, to-wit: ..... in the municipal corporation of....., county of.....,

state of Ohio, are (in favor of or opposed to) prohibiting the sale of intoxicating liquors as a beverage in said residence district."

Date.....

.....

Official Signature.

**[Recording of certificate.]** The clerk of the municipal corporation in which the residence district is situated shall forthwith upon receiving the certificate of the decision of the sufficiency of the petition, record said petition with the said certificate of such decision on the records of the council of the municipal corporation and shall certify to the correctness of the same substantially as follows:

"I hereby certify that the foregoing is a correct copy of the petition relating to the sale of intoxicating liquors as a beverage in the following residence district, to-wit:.....  
....., in the municipal corporation of.....  
and the finding of the mayor or judge on the petition."

.....

Official Signature.

**[Bribery and intimidation; penalty.]** Whoever bribes, boycotts or intimidates or attempts to bribe, boycott or intimidate any qualified elector to keep such elector from signing the petition or to secure the signature of such elector to the petition provided for in this act; or whoever removes any person in his employ or threatens to remove any person in his employ or under his control, either directly or indirectly, in order to secure his signature to such petition, or to keep such person from signing such petition, shall be guilty of a misdemeanor and shall be fined not less than \$100, nor more than \$500, and the signature of any person secured to such petition by bribery, boycott or intimidation shall be stricken from such petition. [1906, April 4, 98 v. 70; 97 v. 90, § 5.]

**[Sec. 5.] [When the sale in a residence district shall be unlawful; penalty for making such prohibited sale.]** If the findings of the mayor or judge or a copy as recorded by the clerk of the municipal corporation or council on the records of the council shows that a majority of the qualified electors in the residence district named are in favor of prohibiting the sale of intoxicating liquors as a beverage, then, from and after thirty days from the date of such finding by the mayor or judge it shall be unlawful for any person, personally or by agent within the limits of such residence district of such municipal corporation to sell, furnish or give away any intoxicating liquors to be used as a beverage, or to keep a place where such intoxicating liquors are kept for sale, given away or furnished for beverage purposes, and whoever from and after thirty days aforesaid in any manner whatever, directly or in-



directly, sells, furnishes or gives away, or otherwise disposes of any intoxicating liquors as a beverage, or keeps or uses a place, structure or vehicle, whether permanent or transient for such selling, furnishing or giving away or in which or from which intoxicating liquors are sold, furnished or given away or otherwise disposed of as aforesaid, or violates any of the provisions of this act shall be guilty of a misdemeanor and shall on conviction thereof be fined not more than two hundred dollars nor less than fifty dollars for the first offense; and shall for any subsequent offense be fined not more than five hundred dollars, nor less than two hundred dollars. The court on any conviction for a second or subsequent offense shall order the place where such liquor is sold, furnished or given away for beverage purposes to be abated as a nuisance and shall order the person convicted for [such] subsequent offense to give bond payable to the state of Ohio in the sum of one thousand dollars with sureties to the acceptance of the court that he will not sell, furnish or give away intoxicating liquor as a beverage in such residence district in violation of law. [1906, April 4, 98 v. 71; 97 v. 88, § 2.]

[Sec. 6.] [What territory controlled by result of action.] The territory enclosed by the boundary of any residence district within which the sale of intoxicating liquors has been prohibited, as provided for in section one of this act, shall be controlled by the result of such action, and the law shall remain in full force and effect in said residence district for two years and thereafter until another petition is presented under the provisions of section two of this act in said residence district; and after a petition against prohibiting the sale of intoxicating liquors has been presented and held sufficient by the judge or mayor, another petition can not be presented for two years thereafter.

[Sec. 7.] [Meaning of phrase "intoxicating liquor"; regular druggists.] The phrase "intoxicating liquor" as used in this act shall be construed to mean any distilled, malt, vinous or any intoxicating liquor, by whatever name the same may be known, but nothing in this act shall be construed to prevent the selling of intoxicating liquors at retail by a regular druggist for exclusively known medicinal, mechanical, pharmaceutical, scientific or sacramental purposes; and when sold for medicinal purposes shall be sold only in good faith upon a written prescription issued, signed and dated in good faith by a reputable physician in active practice and the prescription used but once. Such prescription shall contain the name of the party for whom the liquor is prescribed, and direction for its use. The words "giving away" where they occur in this act shall not

apply to the giving away of intoxicating liquor by any person in his private dwelling unless such private dwelling is a place of public resort.

**[Manufacturer may sell at wholesale to retail dealers.]** And nothing contained in any of the sections of this act shall in any manner affect the right of any manufacturer of intoxicating liquors from the raw material, to sell, deliver and furnish his product in wholesale quantities to bona fide retail dealers trafficking in intoxicating liquors or in wholesale quantities to any party or parties residing outside the limits of said district, nor of any bona fide wholesale dealer in said district to sell or deliver intoxicating liquors in wholesale quantities to customers of such district, or to bona fide residences in such district.

**[Meaning of term "qualified elector."]** The original petitions and findings of the mayor or judge shall be filed with the clerk of the municipal corporation or council as a public document. The term "qualified elector" as used in this act means registered male voters in all municipal corporations which have registration and all other male voters entitled to register who have been bona fide residents of the district for four months before such petition is filed with the mayor or judge. In municipalities which do not have registration, such male voter or male qualified elector must be a bona fide resident of the district for four months before such petition is filed with the mayor or judge.

**[Meaning of phrase "residence district."]**<sup>1</sup> The phrase "residence district" as used in this act, shall be construed to mean any clearly described, contiguous, compact section or territory in a municipal corporation bounded by street, corporation, or other well recognized lines or boundaries and containing not fewer than three hundred qualified electors, nor more than five thousand qualified electors; and such district shall not contain any block in which one-half or more of the foot frontage of such block is occupied by buildings and premises actually devoted to commercial, manufacturing, mercantile or other business purposes not including saloons; and further, such district shall not contain the property or premises abutting on a section of a street lying between two consecutive cross or intersecting streets, from street to street, or extending for a distance of not less than five hundred feet along such street on which said premises abut, whenever sixty-five per cent. of the foot frontage of such abutting property on each side of such street is occupied for and devoted to manufacturing, mercantile or other business purposes, not including saloons, if such section of such street is in the central or main business part of the municipal corporation; provided, however, that in determining the total foot frontage referred to herein,

property occupied by saloons shall not be counted as either business or residence property. Whenever a section of a street is made exempt from the provisions of this act, lot lines may be used in outlining the boundary of the district to exempt the property facing on such section of such street.

Parks in residence districts and properly devoted to educational, religious or charitable uses, shall for the purpose of this act, be held to be occupied for residence purposes; while public property devoted to other than the above specified uses, shall, for like purposes, be deemed to be occupied for business purposes. Buildings which have more than one-half of the floor space of the buildings used for residence purposes shall be counted as residence property. When but one side of said portion of said street is adaptable for residence or business purposes, then such side of such portion of such street shall determine whether the property abutting on both sides of such street be counted as business or residence property. The maximum length of a residence district shall not exceed three times its maximum width unless the boundaries of the municipal corporation or exempted territory prevents the district from containing the requisite number of voters. In such case the boundaries shall follow the proportionate length and breadth provided herein as nearly as possible.

[**Meaning of terms "block" and "saloon."**]<sup>1</sup> The term "block" shall be construed to mean the territory bounded by four well recognized adjacent streets and not alleys. The term "saloon" shall mean any place where intoxicating liquor is sold or trafficked in as a beverage. [1906, April 4, 98 v. 72; 97 v. 89, § 4.]

(1) **Definition of terms.**—See Toledo, 14 Dec. 698; 2 N. P. (N. S.) 469; *In re* Petition for Election, 14 Dec. 561; 2 N. P. (N. S.) 245.

[**Sec. 8.**] [**Sufficiency of indictments under this act.**] In indictments, informations or affidavits for violations of this act, it shall not be necessary to set forth the facts showing that the required number of electors in any residence district of a municipal corporation signed a petition in favor of prohibiting the sale of intoxicating liquors or that there was a public hearing or that any finding was made upon such petition or that a certificate of such findings with the petition was transmitted to the clerk or a record made of it by the clerk, as hereinbefore provided; but, it shall be sufficient to state that the act complained of was then and there in the residence district named prohibited and unlawful. [1906, April 4, 98 v. 73; 97 v. 91, § 8.]

[**Sec. 9.**] [**Rebate of Dow tax when sale discontinues.**] When any person, company or corporation engaged in the traffic has



discontinued such traffic within the time specified by section one of this act and has paid or is charged upon the tax duplicate with an assessment upon such traffic, the county auditor, upon being satisfied of such facts shall issue to such person, company or corporation a refunding order of an amount proportionate to the unexpired time for which said assessment has been paid or is charged. [1906, April 4, 98 v. 73; 97 v. 91, § 7.]

[**Sec. 10.**] [**Disposition of fines collected.**] Money received from fines and forfeited bonds collected under the provisions of this act, shall be paid into the treasury of the municipal corporation wherein such fine was imposed or bond forfeited, and shall be applied to such purposes as the council thereof may direct. [1906, April 4, 98 v. 74; 97 v. 91, § 10.]

[**Sec. 11.**] [**Former residence district local option law.**] In all residence districts where the sale of intoxicating liquor has been prohibited under the provisions of the act entitled "An act further to provide against the evils resulting from the traffic in intoxicating liquors by providing for local option in residence districts of municipal corporations," passed April 18, 1904 (97 O. L. 87), such law thus prohibiting the sale of intoxicating liquors as a beverage shall remain in full force and effect in such residence district for two years from the date of the local option election held and thereafter until a petition has been presented to the mayor or judge as provided for in section one or two of this act. [1906, April 4, 98 v. 74.]

[**Sec. 12.**] [**Proceedings in error.**] Any person being a qualified elector of any residence district of any municipal corporation wherein a petition shall have been presented and held sufficient by a mayor or judge as provided for in this act may prosecute error from such finding by first filing a motion for leave to file a petition in error with the circuit court of the county in which such residence district is situated. The motion shall not be granted unless for good cause shown. If such motion is granted, a petition in error shall be filed within fifteen days after the finding or decision of the mayor or judge setting forth the errors complained of. The circuit court upon the filing of such petition shall forthwith issue a summons<sup>1</sup> addressed to the mayor of such municipal corporation notifying him of the filing of the petition in error and directing him to appear in said court on behalf of said residence district at the time mentioned in the summons which time shall not be more than thirty days after the finding or decision of the mayor or judge nor less than ten days after the filing of such petition. The circuit court shall have final jurisdiction to hear and determine the merits of the proceedings and there shall be no appeal or error proceedings allowed from such decision. The circuit court shall require the person or persons prosecuting error from the finding or decision of the

mayor or judge to furnish security for costs before such petition is filed. Any qualified elector in such residence district may appear in person or by attorney at such hearing before the circuit court or on the motion for leave to file petition in error in defence of the validity of the proceedings before the mayor or judge taking action upon the petition. [1906, April 4, 98 v. 74.]

(1) **Service of summons** under *In re* Petition of Gorey, 2 N. P. (N. former law, see Short v. Cincinnati, S.) 389.  
3 N. P. (N. S.) 117; 50 B. 288;

[**Sec. 13.**] [**Repeals, etc.**] That the act entitled "An act further to provide against the evils resulting from the traffic in intoxicating liquors by providing for local option in residence districts of municipal corporations," passed April 18, 1904, and approved April 19, 1904 (97 O. L., p. 87), be and the same is hereby repealed when this act goes into effect. [1906, April 4, 98 v. 74; 97 v. 87.]

#### 4. DANCE HALLS, Etc.

**Sec. 6945a R. S.** [**No public dance, roller skating or like entertainment shall be given without mayor's permit.**] No public dance, roller skating or like entertainment shall be permitted or given in any building, hall, room or rink within any city or village within this state, without first having obtained a permit so to do from the mayor of the city or village in which said dance, roller skating or like entertainment is to be held or given. [1906, April 4, 98 v. 61.]

**Sec. 6945b R. S.** [**Sale of intoxicating liquors on premises where such entertainment is being given, prohibited.**] No intoxicating liquors of any kind shall be sold or served on the same floor or floors of any building, hall, room or rink on which such public dance, roller skating or like entertainment is being held or given, during the progress of such entertainment, or in any room or rooms directly connected therewith by any door or stairway, which connects such hall, room or rink with any room or place on the same floor or floors wherein intoxicating liquors are sold or kept for sale. [1906, April 4, 98 v. 62.]

**Sec. 6945c R. S.** [**Police shall enforce this act; notice shall be posted; penalty.**] It is hereby made the duty of the mayor of any city or village where in his opinion it is necessary to detail such number of police officers as may be required to preserve order at such public dance, roller skating rink or other entertainment and enforce the provisions of this act. And it is hereby made the duty of the owner or lessor of any building containing any dance hall, room or rink, to keep posted in a conspicuous place in such hall, room or rink, a copy of this act.

Whoever violates any provision of this act shall be fined in any sum not exceeding one hundred dollars (\$100.00) nor not less than fifteen dollars (\$15.00) or be imprisoned not more than sixty days, or both. [1906, April 4, 98 v. 62.]

## XXI

LICENSES.<sup>1</sup>

**Sec. 4238—6 R. S. [Plumber's license.]** § 1. Any person, firm or corporation now, or that may hereafter be engaged in, or working at the business in this state either as master or employing plumber, or as a journeyman plumber shall first secure a license therefor, in accordance with the provisions of this act. [92 v. 263.]

(1) **Licensing power of council.**—See § 2669 *et seq.*, re-enacted in § 8 of the Code, page 73 *et seq.*

**Sec. 4238—7 R. S. [Application and examination.]** § 2. Any person desiring to engage in, or work at, the business of plumbing, either as a master or employing plumber, or as a journeyman plumber, shall apply to the president of the board of health or other officer having jurisdiction in the locality where he intends to engage in, work at, such business, and shall at such time and place as may be designated by the board of examiners hereinafter provided for, to whom such application shall be referred, be examined as to his qualifications for such business. In case of a firm, or corporation, the examination and licensing of any one member of such firm, or the manager of such corporation, shall satisfy the requirements of this act.<sup>1</sup> [92 v. 263.]

(1) **Validity.**—This section is unconstitutional in so far as it imposes the burden of an examination on some, and exempts others of the same class, pursuing the same business in the same way. *State v. Gardner*, 58 O. S. 599.

**Sec. 4238—8 R. S. [Examiners; appointment, qualifications, etc.]** § 3. There shall be in every city and each town of five (5) thousand inhabitants, or more, and in each town having a system of water supply or sewerage, a board of examiners consisting of the president of the board of health; and the inspector of



buildings of said city or town if any there be and three (3) members, who shall be practical plumbers; (two shall be master plumbers, one shall be a journeyman plumber); the president of the board of health and the inspector of buildings shall be members ex officio of said board and serve without compensation; provided, that in localities where the required number of plumbers can not be secured, such vacancies may be filled by the appointment of reputable physicians. Said members shall be appointed by the board of health, if there be no board of health, then by the health-officer of said city or town, within three (3) months after the passage of this act, for the term of one (1) year, said appointment to date from the first day of August A. D. 1896, and thereafter annually, and said appointed members of such board shall serve without compensation; provided, that if in any city or town there is no inspector of buildings, said board of health shall appoint a fourth member of said board of examiners, who shall be a practical plumber, and whose term of office shall be the same as is heretofore provided for said three (3) members. [92 v. 263.]

**Sec. 4238—9 R. S. [Organization of board; time, place and duties.]** § 4. Said board of examiners shall, within thirty (30) days after the appointment of said members, meet and organize by the selection of a chairman, and then shall designate the time and place for the examination of all applicants desiring to engage in or at the business of plumbing within their jurisdiction. Said board shall examine said applicants as to their practical knowledge of plumbing, house-drainage and plumbing-ventilation, and if satisfied of the competency of the applicant, shall so verify to the board of health. Such board shall thereupon issue a license to such applicant, authorizing him to engage in, or at, the business of plumbing, either as a master or employing plumber, or as a journeyman plumber. The fee for the license for a master or employing plumber, shall be five (\$5) dollars; for a journeyman plumber shall be one (\$1) dollar. Said license shall be valid and have force throughout the state, and shall be renewed annually upon the payment of a fee of fifty cents. In case of a removal beyond the jurisdiction of the board issuing the original license, it may be renewed by any board having like authority. [92 v. 263.]

**Sec. 4238—10 R. S. [Inspector of plumbing.]** §5. The board of health of each city or town mentioned in section (3) [§(4238—8)] of this act, shall within three months from and after the passage of this act, appoint one or more inspectors of plumbing and such appointment shall be subject to the approval of the

council of such city or town (if such appointment has not already been made), who shall be practical plumbers, and shall hold office until removed by such board of health for cause, which must be shown. The compensation of such inspectors shall be determined by the said board of health and be paid from the treasury of their respective cities or towns. Said inspector so appointed shall inspect all plumbing work for which permits are hereafter granted, within their respective jurisdiction, in process of construction, alteration or repair, and shall report to said board of health all violations of any law, ordinance or by-law relating to plumbing work, and also perform such other appropriate duties as may be required by said board. [92 v. 263.]

**Sec. 4238—11 R. S. [Rules governing plumbing and sewerage.]** § 6. The board of health of each city or town of five (5) thousand inhabitants or more in this state, and every town having a system of water supply or sewerage, shall within six (6) months from the passage of this act, prescribe rules and regulations for the construction, alteration and inspection of plumbing and sewerage placed in, or in connection with any buildings in such city or town; which shall be approved by ordinance by the council, of such city or town, and the board of health shall further provide, that no plumbing work shall be done except in the case of repairs or leaks, without a permit being first issued therefor upon such terms and conditions as such board of health of said city or town shall prescribe. [92 v. 263.]

**Sec. 4238—12 R. S. [Penalty.]** § 7. Any person violating any provision of this act shall be deemed guilty of a misdemeanor, and shall be subject to a fine not exceeding fifty (\$50) dollars, nor less than five (\$5) dollars for each and every violation thereof. The license of any master or journeyman plumber may at any time be revoked for incompetency, dereliction of duty or other sufficient causes after a full and fair hearing by a majority of the examining board, but an appeal may be taken from said examining board to the state board of health, and license may be revoked by the examining board provided for in section three (3) [§(4238—8)] of this act. [92 v. 263.]

**Sec. 4238—13 R. S. [Disposition of money derived from examinations.]** § 8. All money derived from the examination of applicants shall go to the board of health at the place where the applicant was examined. [92 v. 263.]

**Sec. 4238—23 R. S. [Explosives; License; how granted.]**

§ 3. The common council of any city or incorporated village within this state, or the trustees of any township, may, by a majority vote of all the members elected thereto, at a regular meeting, upon application duly made under the provisions of this act, grant a certificate of license to any person, firm or corporation, authorizing the same to manufacture the substance or material known as dynamite or other nitro-explosive compound, in accordance with the conditions and restrictions hereinafter mentioned. [82 v. 182.]

**Sec. 4386 R. S. [Who may carry on business of pawnbroker.]**

No person shall carry on or conduct the business or calling of pawnbroker, or of loaning money on personal property without having obtained from the mayor of the municipal corporation in which it is proposed to carry on such business, a license so to do. [(S. & S. 821.)]

**Sec. 4387 R. S. [Pawnbroker defined.]**

Whoever loans money on deposit or pledges of personal property, or who purchases personal property or choses in action, on condition of selling the same back again at a stipulated price, is hereby defined and declared to be a pawnbroker.

**Sec. 4388 R. S. [To whom and on what conditions license may be issued.]** The mayor of any municipal corporation may grant a pawnbroker's license to any person of good moral character who may apply therefor, when the applicant pays into the treasury of the corporation a sum to be fixed by ordinance, not to exceed two hundred dollars per annum, and executes a bond, with surety, to the satisfaction of the mayor to the municipal corporation, in the sum of five hundred dollars, that the applicant will conform to the requirements of the law and any ordinance of the corporation.

**Sec. 4389 R. S. [Record to be kept, and what entries to be made therein.]** The person so licensed shall keep a correct list and description, in a book for that purpose, of every article pledged or deposited with him, or on which advances of money have been made, or which may be purchased by him, which list and description shall at all times be open to the inspection of the chief or superintendent of police of the corporation, or of a police officer deputed by him, or by the mayor, to make such inspection; and he shall, at all times, when required by the police officer or mayor aforesaid, produce, and show any article so listed and described which may be in his possession; he shall also register in such book the name and place of residence of the depositor, and time when the deposit was made; all the



entries shall be written in ink in the English language, and no entry shall be erased, obliterated, or defaced. [(S. & S. 821.)]

**Sec. 4390 R. S.** [List of articles pawned to be daily sent to mayor.] Every person so licensed shall prepare and deliver to the mayor every day before the hour of twelve o'clock M. a legible and correct copy from such registry of the description of all personal property, bonds, notes, or other securities received on deposit or purchase during the preceding day, together with the hour at which the article was received, together with a description of the person by whom left in pledge, or from whom the same were purchased.

**Sec. 4391 R. S.** [Pawnbroker to detain article twenty-four hours thereafter.] No bond, note, security, or personal property of any kind, received on deposit, purchased, or pledged by any such pawnbroker shall be sold or permitted to be redeemed or removed from his place of business of such pawnbroker for the space of twenty-four hours after the copy and statement provided for in the last section has been delivered.

**Sec. 4392 R. S.** [Hours for doing business.] No person licensed as aforesaid shall receive on deposit, or purchase, any personal property, bonds, notes, securities, or article, property, or thing, as such pawnbroker, before the hour of six o'clock A. M., nor after the hour of eight o'clock P. M., during the months of January, February, March, April, October, November, and December of each year, nor before the hour of five A. M., nor after the hour of nine P. M., during the months of May, June, July, August, and September of each year.

**Sec. 4393 R. S.** [Articles not to be received from minor, or intoxicated or suspected person.] No person licensed as aforesaid shall take or receive in pawn or pledge for money loaned, or shall take, receive, or purchase, within the line of his business as a pawnbroker, any property, bonds, notes, securities, articles, or thing whatsoever, from any minor, or the ownership of which is in or which is claimed by any minor, or which may be in the possession or under the control of any minor, or a person appearing to be intoxicated, a person known to be a notorious thief, or a person known to have been convicted of larceny or burglary.

**Sec. 4394 R. S.** [Not to carry on other business in same building, nor employ minors.] No such person shall carry on any other business or vocation directly or indirectly in the same building in which such business of pawnbroking is carried on,

nor employ any person under the age of sixteen to take pledges in pawn.

**Sec. 4395 R. S. [When mayor shall revoke license.]** The mayor shall, upon the conviction of any such person of a violation of any of the provisions of this chapter, revoke his license.

**Sec. 4396 R. S. Penalty for violation of provisions of chapter.]** A person convicted of a violation of any provisions of this chapter, where no other penalty is provided for, shall be fined not less than ten nor more than two hundred dollars.

**Sec. 4398 R. S. [Proceedings on application for peddler's license; fees to be paid.]** Any person shall have a license to peddle in this state, who files with the auditor of any county, under oath, which may be administered by the auditor, a statement or list of his stock in trade, in conformity with the law with respect to statements by merchants, and pays to the treasurer of such county the proportionate amount of taxes on such stock in trade in conformity with such law, together with twelve dollars, if the applicant intends to travel on foot; twenty dollars, if on horseback or in a one-horse wagon, or other vehicle; twenty-eight dollars, if in a two-horse wagon or other vehicle, and sixty dollars, if in a boat or other water craft, or in railroad cars, and files with the auditor separate receipts of the treasurer therefor, and also pays to the auditor fifty cents for granting the license; which sums, except taxes and auditor's fees, shall be credited to the "state common school fund," and it shall be the duty of each and every county treasurer, with whom any money may be deposited in conformity with this chapter, to account to the auditor of state for such sums deposited on account of license, and upon his draft pay the same into the state treasury, each year hereafter, at the time of making his semi-annual August settlement with the auditor of state, and the same shall be placed to the credit of the state common school fund; but any merchant in this state, who, by himself or agent, desires such license, shall not be required to make the statement herein required, if the subject matter thereof has been otherwise listed for taxation. [1882, April 7: 79 v. 96; 59 v. 67, § 2; (S. & S. 511; S. & C. 907).]

**Sec. 4398a R. S. [Fee to be paid by honorably discharged soldier or sailor for peddler's license.]** Any applicant for license, as provided for in section 4398 preceding, who proves, to the satisfaction of the auditor to whom such application is made that the applicant has served as a soldier or sailor in the service of the United States during the late rebellion or Spanish Ameri-

can war, and has been honorably discharged therefrom, shall pay for such license, to such auditor, the sum of fifty cents and no more, which sum of fifty cents shall be the fee of such auditor for issuing such license. [1902, February 13: 95 v. 11; 91 v. 370.]

**Sec. 4398b R. S. [Privileges, etc., Cincinnati.] § 2.** Such license so granted to any honorably discharged soldier or sailor, as provided for in section 1 [§ 4398a] of this act, shall grant the privilege to the one so licensed to pursue his calling within the limits of the state of Ohio, for the term of one year from the date of such license, and shall exempt him from paying any municipal or other license during the period covered by the license issued to him by such auditor. It shall, however, be competent for such municipal authorities issuing such license to revoke and cancel it whenever it is shown to their satisfaction that such person has been guilty of any wrongful act in connection with any such business or is not otherwise a fit person to be engaged in such business, and provided further that the provisions of this act shall not apply to corporations containing cities of the first grade of the first class. [91 v. 370.]

**Sec. 4399 R. S. [Privileges and term of license.]** A license granted in conformity with the preceding section shall authorize the person in whose name the same is granted to vend and sell goods, wares, and merchandise for one year from the date of the receipt of the treasurer, as a peddler or traveling merchant; but any such person may take out a license to peddle for the term of three or six months, and pay for the same proportionably, in accordance with the provisions of the preceding section.<sup>1</sup> [59 v. 67, § 3; S. & S. 511; (S. & C. 907).]

(1) This refers to § 4398 R. S.

**Sec. 4400 R. S. [License to peddle, no authority to sell by auction, etc.]** A license to peddle shall not authorize the person named therein to sell goods, wares, or merchandise at auction, vendue, or public outcry, nor to sell goods in any way by the agency of any other person. [46 v. 36, § 4; S. & C. 907.]

**Sec. 4415 R. S. [Show not to be exhibited without permit from auditor.]** No proprietor, or agent of the proprietor, of a traveling public show, not prohibited by law, shall exhibit or show any natural or artificial curiosity, or exhibition of horsemanship in a circus, or otherwise, for a price, until a permit has been obtained from the auditor of the county in which it is intended to show or exhibit, specifying the time and place such show may exhibit in the county; which permit the auditor



shall not issue until there has been paid into the county treasury, the following sums for each day such show is to be exhibited, to wit: in counties containing a population not exceeding twenty-five thousand by the last federal census, twenty-five dollars. In counties containing a population of more than twenty-five thousand and not exceeding forty thousand by said census, forty dollars, and in all other counties, sixty dollars. [1882, April 15: 79 v. 114; Rev. Stat. 1880; 29 v. 446, § 1; 45 v. 43, § 2; (S. & C. 1406; S. & C. 64).]

**Sec. 4416 R. S.** [Right of municipal corporations to license, unaffected.] The preceding section shall not be construed to interfere with the right of power of a municipal corporation to impose a license upon all shows exhibited in such corporation in addition to that imposed herein. [47 v. 51, § 3; S. & C. 1407.]

**Sec. 4402—1 R. S.** [Statement required of itinerant vendor.] § 1. No itinerant vendor shall advertise, represent or hold forth any sale of goods, wares, or merchandise as an insurance, bankrupt, insolvent, assignee, trustee, estate, executor, administrator, receiver or closing-out sale, or as a sale of any goods damaged by smoke, fire, water or otherwise, or in any similar form unless he shall, before so doing, state, under oath, to the secretary of state, either in the original application for a state license, or in a supplementary application, subsequently filed and copied on the license, the details of said bankruptcy, insolvency, trusteeship, closing-out, damage, etc., such details to include and cover all the facts relating to time, place and persons necessary to exactly locate and fully identify the same.<sup>1</sup> [91 v. 173; 95 v. 544.]

(1) **Validity.**—This act §§ (4402-1) to (4402-9) held constitutional. *Ex parte Mosler*, 8 C. C. 324.

**Sec. 4402—2 R. S.** [State and local licenses, etc.] § 2. It shall be the duty of every itinerant vendor, whether principal or agent, before commencing business, to take out a state license and local licenses in the manner hereinafter set forth; but nothing herein contained shall affect the right of any municipal corporation to pass such additional ordinances relative to itinerant vendors as may be permissible under the general law, or under their respective charters. Every itinerant vendor desiring to do business in this state shall deposit with the secretary of state the sum of \$500 as a special deposit,<sup>1</sup> and after such deposit, upon application in proper form and the

payment of a further sum of \$25 as a state license fee, the secretary of state shall issue to him an itinerant vendor's license, authorizing him to do business in this state in conformity with the provisions of this act for the term of one year from the date thereof. Every license shall set forth a copy of the application upon which it is granted. Such license shall not be transferable nor give authority to more than one person to sell goods as an itinerant vendor, either by agent or clerk, or in any other way than in his own proper person; but any licensee may have the assistance of one or more persons in conducting his business, who shall have authority to aid their principal, but not to act for or without him. [91 v. 173.]

(1) **The cash deposit** with sec- creditors cannot secure it. *Edit.*, 37  
retary of state is to secure pur- B. 354.  
chasers of goods who are defrauded;

**Sec. 4402—3 R. S. [Penalty.]** § 3. Every itinerant vendor who shall sell or expose for sale at public or private sale any goods, wares, merchandise or any article of wearing apparel without state and local licenses therefor, and all persons both principals and agents, who shall by circular, handbill, newspaper, or in any other manner advertise any such sale before proper licenses shall be issued to the vendor, shall be guilty of a misdemeanor and shall be fined not more than \$1,000 nor less than \$50, or imprisoned not more than six months, or both. [91 v. 173; 95 v. 544.]

**Sec. 4402—4 R. S. ["Wearing-apparel" and "itinerant vendors" defined; sales by commercial travelers, etc.]** § 4. The words "wearing apparel," for the purposes of this act, shall be construed to mean and include all kinds of clothing, underwear, hats and shoes. The words "itinerant vendors," for the purposes of this act, shall be construed to mean and include all persons, both principals and agents, who engage in a temporary or transient business of selling goods, wares and merchandise in this state and who shall remain in one place for a period of less than (90) ninety days. This act shall not apply to sales made to dealers by commercial travelers or selling agents in the usual course of business, nor to bona fide sales of goods, wares and merchandise by sample for future delivery. [91 v. 173.]

**Sec. 4402—5 R. S. [Application for license, etc.]** § 5. All applications for license shall be sworn to, shall disclose the names and residences of the owners or parties in whose interest said business is conducted, and shall be kept on file by the secretary of state, and a record shall be kept by him of all licenses issued upon such applications. All files and records,

both of the secretary of state and of the respective clerks of municipal corporations, shall be in convenient form and open for public inspection. Before selling under said state license, every itinerant vendor shall exhibit the same to the clerk or mayor of any municipal corporation where he proposes to make sales, and upon payment to said clerk or mayor of a further local license fee as provided for by the ordinance, or in absence of any such ordinance, then such amount as the clerk or mayor of such municipal corporation shall determine, and the proof of payment of all such other license fees, if any, as are legally chargeable upon local sales, the said clerk shall record the state license in full, shall indorse upon it the words "local license fees paid," and shall affix his official signature, together with the date of such indorsement. He shall then issue a local license authorizing sales within the limits of such town or city. Any failure to obtain a local license and have proper indorsement made on the state license shall be subjected to the same penalty as though no state license had been issued. [91 v. 173.]

**Sec. 4402—6 R. S. [Penalty.]** § 6. Any false statement in an application, either original or supplementary, for a license, and any failure on the part of any licensee to comply with all the requirements of this act, shall subject said itinerant vendor to the same penalty as if he had no license, and to the further and additional penalty of a fine of \$100, to be paid to the person first filing complaint therefor with the proper informing or prosecuting officer. [91 v. 173.]

**Sec. 4402—7 R. S. [Enforcement of act.]** § 7. It shall be the duty of the respective informing or prosecuting officer in each municipal corporation in this state, to see that the provisions of this act are complied with and to prosecute for violation of the same. All such officers shall have power to demand the production of the proper state and local licenses from any itinerant vendor advertising or actually engaged in business, and any failure to produce such licenses shall be prima facie evidence against such vendor that he has none. [91 v. 173.]

**Sec. 4402—8 R. S. [Jurisdiction in prosecutions; expiration or surrender of state licenses; disposition of special deposit.]** § 8. Prosecutions under this act may be heard and determined by any court having criminal jurisdiction over other offenses punishable by law, to the same extent as hereinabove provided. All state licenses shall expire by limitation one year from the date thereof, and may be, if so desired surrendered at any time



prior thereto for cancellation. Upon the expiration and return or surrender of each state license the secretary shall cancel the same, indorse the date of delivery and cancellation thereon and place the same on file. He shall then hold the special deposit of each licensee, hereinabove mentioned, for the period of 60 days, and after satisfying any and all claims made upon the same under the section next following, shall return said deposit or such portion of the same, if any, as may remain in his hands, to the licensee depositing it. [91 v. 173.]

**Sec. 4402—9 R. S.** [Deposit subject to attachment and execution, etc.] § 9. Each deposit made with the secretary of state shall be subject, so long as it remains in his hands, to attachment and execution in behalf of creditors whose claims arise in connection with business done in the state, and to the payment of any and all fines and penalties incurred by the licensee through violation of this act. Claims under civil process shall be enforced against the secretary of state as garnishee or trustee by action in the usual form, and claims for satisfaction of fines and penalties shall be enforced by the prosecuting attorney serving notice of pendency of action (and judgment when obtained) upon the secretary of state. All claims upon each deposit shall be satisfied after judgment in the order in which notice of the claim is received by the secretary of state, and until all such claims are satisfied, or the deposit exhausted; but no notices filed after the expiration of the 60 days' limit aforesaid shall be valid. No deposits shall be paid over by the secretary of state to licensees so long as there are any outstanding claims or notices of claims against them respectively, unless he shall find that there is unreasonable delay in enforcing the same. [91 v. 173.]

## XXII

HAMLETS.<sup>1</sup>

## 1. TRUSTEES OF HAMLETS.

**Sec. 1648 R. S.** [Officers of hamlets; election and terms.] The officers<sup>2</sup> of the hamlet shall consist of three trustees, who shall be electors residing within the corporate limits and who shall hold their offices for three years, except as herein provided, and until their successors are elected and qualified; a clerk and treasurer, each of whom shall be electors in said hamlet and shall hold their offices for two years and until their successors are elected and qualified; a marshal and a supervisor, both of whom shall be electors in said hamlet and shall hold their offices for one year, except as hereinafter provided, and until their successors are elected and qualified. [93 v. 289; 90 v. 78; 66 v. 157, § 47; 66 v. 159, § 58.]

(1) See note "Status of Hamlets" under § 1 of the Code, page 3. As to police court in hamlets, see §§ 1833 to 1836 R. S., inclusive, under title JUDICIAL, in Part II.

(2) See notes to § 128 of the Code, page 328.

**Sec. 1649 R. S.** [Term of office.] At the first meeting of the trustees, they shall determine by lot the term of service of each, so that one shall serve for one year, one for two years, and one for three years, and at every succeeding annual election, one trustee shall be elected to serve for three years, and they shall appoint from their own body a president of the board: [66 v. 158, § 48; 73 v. 170, § 49.]

**Sec. 1650 R. S.** [Vacancy; quorum.] The trustees shall have power to fill any vacancies which may happen in any of the offices from the electors of the corporation, and the person so appointed shall continue in office until the next regular election and until his successor is elected and qualified; and any two of the trustees may transact business, but notice of any meeting for the purpose must be given to all.<sup>1</sup> [90 v. 78; 66 v. 158, § 50.]

(1) **Acting separately.**—Individual members of such a board cannot act separately so as to bind the corporation. State *ex rel.* vs. Liberty Twp., 22 O. S. 144; McCortle vs. Bates, 29 O. S. 419.

**Sec. 1651 R. S. [Power over streets, etc.]** The trustees shall have the exclusive jurisdiction of public roads, streets, alleys, sewers and drains within the limits of the corporation; <sup>1</sup> they shall have power to construct and keep in repair bridges and sidewalks; lay out, establish, open, widen, vacate, narrow, improve, straighten; keep in order, repair and light roads, streets, alleys; open and construct and keep in order and repair sewers and drains; and enter upon, appropriate, take and hold for the purposes aforesaid real estate within its limits, and assess, and collect a charge for the construction, improvement and repair of any such road, street or alley; but if a street is vacated or narrowed, the right of way or easement of lot owners shall not thereby be impaired. [90 v. 315; 74 v. 198, § 51.]

(1) **Street railways in hamlets.**  
—§ 1651 R. S. gives to trustees of hamlets exclusive jurisdiction of public streets, etc., and when an interurban street railway company has permission from such trustees to use the streets within the hamlet, the county commissioners cannot maintain an action to enjoin their use by such company. Commissioners v. R. R. Co., 21 C. C. 769.

As to necessity of consent of trustees of hamlets to construction of street railway, where authority of owner of private turnpike on which the road is constructed has been obtained, see St. Ry. v. Cummins-ville, 14 O. S. 523, 542, in connection with § 1550 R. S. (repealed) which provided that villages incorporated for special purposes should be hamlets.

**Sec. 1652 R. S. [Limitation on such powers; hamlets in counties containing cities of the first class.]** No ordinance providing for the opening or widening of any road, street or alley, or the appropriation of land therefor, and no ordinance providing for any improvement, the cost of which, or any part thereof, shall be specially assessed upon any lands in the hamlet, shall be passed, except upon the petition of two-thirds of the owners of lots or lands through or along which the road, street, alley, sewer or other improvement, or part thereof, to be opened, widened, improved or lighted, shall pass; provided, however, that in all counties containing cities of the first class all the provisions of chapter four, division seven, of this title,<sup>1</sup> affecting or relating to villages generally, shall apply to and affect hamlets, and wherever the word "council" occurs in said chapter, the same shall be held to apply to and include the



trustees of hamlets. [93 v. 289; 92 v. 281; 91 v. 367; 90 v. 315; 66 v. 158, § 52.]

(1) **Statutes referred to.**— provisions corresponding to this Chap. 4, Div. 7, Title XII, was chapter are now contained in §§ 50 the chapter of the Revised Stat- to 94, inclusive of the Code. utes relating to assessments. The

## 2. GENERAL POWERS OF HAMLETS.

**Sec. 1653 R. S.** [General powers of hamlets.] In addition to the powers specifically granted in this title, and subject to the exceptions and limitations in other parts of it, hamlets shall have the general powers enumerated in this section, and the trustees may provide by ordinance for the exercise and enforcement of the same:

1. To protect the property and persons of the inhabitants against injuries and destruction by fire, thieves, robbers, burglars, and persons violating the public peace.

2. To suppress riots, noise and disturbance, gambling, drunkenness, and indecent and disorderly assemblages and conduct.

3. To punish all lewd and lascivious behavior in the streets, alleys and other public places.

4. To suppress and restrain disorderly houses and houses of ill-fame.

5. To regulate and restrain ale, beer and porter houses or shops, and houses and places of notorious and habitual resort for tipping and intemperance.

6. To regulate taverns and other houses of public entertainment.

7. To regulate or restrain theatricals, exhibitions, and public shows, and all exhibitions of whatever name or nature, for which money is demanded or received; but public lectures on historic, literary or scientific subject shall not come within the provisions of this section.

8. To prevent injury or annoyance from any thing dangerous, offensive or unhealthy, and to cause any nuisance to be abated.

9. To acquire real estate for public halls and school houses, and to erect the necessary buildings thereon.

10. To protect all public buildings and property within or owned by the corporation.

11. To provide public cemeteries, and for the improvement and protection thereof, and to regulate the burial of the dead.

12. To regulate auctioneering, and to regulate, license or prohibit the sale at auction of goods, wares and merchandise imported into the corporation for the purpose of being sold at auction.

13. To regulate the weighing and measuring of hay, wood, coal and other articles exposed for sale.

14. To regulate peddling, and to regulate, license or prohibit the sale by peddlers of all goods, wares and merchandise not of their own manufacture or production; but commercial travelers shall not come within the provisions of this section.

15. To restrain and prohibit the sale and exposure for sale of books, papers and periodicals of an obscene nature.

16. To provide for the comfort, convenience and safety, preserve the health and peace, promote the good order and prosperity, and improve the morals of the inhabitants of the corporation.<sup>1</sup> [1886, April 27: 83 v. 92; Rev. Stat. 1880; 66 v. 158, § 53.]

(1) See notes to § 7 of the Code, page 43.

**Sec. 1654 R. S. [Power to make by-laws, etc.]** For the purpose of exercising the powers above granted, the trustees of hamlets shall, as to the providing for the cost and expense of improvements by them made, and as to making and publishing of all by-laws, resolutions and ordinances and the enforcement of the same, have in all respects like rights and remedies as are herein given to incorporated villages;<sup>1</sup> but all by-laws and ordinances shall require for their adoption the concurrence of at least two of the trustees, and shall only be adopted at a stated meeting. [90 v. 316; 73 v. 199, 200, § 54.]

(1) See § 196 of the Code.

### 3. OTHER OFFICERS OF HAMLETS.

**Sec. 1700 R. S. [Appointment of police officers; duties and compensation to be prescribed by trustees; removal; powers, compensation and duties of president of trustees.]** The trustees of hamlets shall have power to appoint from the electors of said hamlet such other police officers as may be necessary; and they shall, by proper by-laws, resolutions or ordinances, prescribe the duties and compensation of the officers so appointed as well as said marshal, in addition to the duties now prescribed by law; and they may remove any such appointed officer and appoint

another at their discretion, and may remove said marshal for good cause shown; and the president of the board of trustees shall be a conservator of the peace throughout the corporation; and shall perform the same duties and shall have the same jurisdiction and powers as are conferred upon the mayors of villages in all civil and criminal cases, and his proceedings may be reviewed in the same manner; and he shall receive no compensation for his services, except such as is allowed for similar services to justices of the peace. [93 v. 289; 90 v. 78; 77 v. 15; Rev. Stat. 1880; 73 v. 170, § 49.]

**Sec. 1701 R. S. [Bond of president, treasurer and marshal.]** The president of the board of trustees, treasurer and marshal shall each give bond to the corporation for the faithful performance of his duties, and each bond shall be in such amount as the trustees may determine except that the bond of the president of the board of trustees shall in no case be less than five hundred dollars, and each bond shall be subject to the approval of said trustees, and after being recorded in the office of the township clerk shall remain in their custody; but if a trustee is principal in any such bond the duties with respect to it shall be performed by the other trustees. [92 v. 84; 90 v. 79; 66 v. 159, § 58.]

**Sec. 1702 R. S. [Duties and fees of clerk and treasurer.]** The clerk shall keep a full record of all the proceedings of the board of trustees, and shall draw orders on the treasurer for the disbursement of moneys of the corporation only on the orders of the trustees; and he shall be entitled to the same fees that township clerks are. The treasurer shall have the custody of all moneys of the corporation, and shall disburse the same only on orders signed by the hamlet clerk and authorized by the trustees, and he shall be entitled to the same fees that township treasurers receive. [90 v. 79; 66 v. 159, § 58.]

**Sec. 1703 R. S. [Marshal and road superintendent in hamlets; compensation.]** The marshal shall be the chief of police, and have the powers of marshals in villages, and for his services as such shall receive, in addition to any salary fixed by the trustees by ordinance, the same fees, and be paid in the same manner as marshals in other municipal corporations for like services, and for his services when he acts as road superintendent, in which office he shall act under the direction of the trustees, he shall be paid out of the proper hamlet treasury or treasuries, the same compensation allowed to other road superintendents, and where the offices of marshal and road superintendent are separated, the road superintendent shall perform his duties, be paid in the same manner and receive the



same compensation as is provided in the first part of this section for the marshal when acting as road superintendent.<sup>1</sup> [1906, April 16, 98 v. 328; 86 v. 251; 77 v. 15; 66 v. 159.]

(1) **Arrest without warrant.**— vs. Hoverman, 18 C. C. 637; and  
A marshal may arrest without war- he is not liable in damages if he  
rant one whom he sees violating an take the person so arrested before  
ordinance of a hamlet. Billington the proper magistrate. *Ib.*

**Sec. 1704 R. S. [No compensation to trustees; exception.]**  
The members of the board of trustees, in their capacity as such, or as trustees, shall receive no compensation, except in counties containing a city of the second grade of the first class, where each trustee shall receive fifty dollars a year for his services as trustee, to be paid out of the hamlet treasury. [92 v. 406; 66 v. 159, § 55.]

**Sec. 1705 R. S. [Time incumbents to remain in office, and by-laws, etc., to remain in force.]** Trustees and officers of incorporated villages for special purposes, shall continue in office as trustees and officers of the proper hamlets until their successors are elected and qualified; and all by-laws, resolutions, and ordinances of such incorporated villages for special purposes, whether originally adopted by them, or by special road districts, shall remain in force as the by-laws, resolutions, and ordinances of the proper hamlets, until repealed. [66 v. 159, § 57.]

#### 4. TAXATION IN HAMLETS.

**Sec. 2681 R. S. [Taxation in hamlets.]** The trustees of hamlets shall have power to levy, annually, upon the taxable property therein, such rate of taxes as may be necessary for the purposes mentioned in chapter *one*, of division *three*, of this title,<sup>1</sup> not exceeding ten mills on the dollar, for all purposes, in any one year; and the taxes so levied shall be collected in the same manner as the taxes of other municipal corporations. [66 v. 257, § 639.]

(1) This refers to Title XII, R. S.

## XXIII

## MISCELLANEOUS STATUTES.

## 1. CERTAIN GENERAL PROVISIONS.

**Sec. 1536 R. S.** [Enlarged meaning of certain words.] In the interpretation of this title,<sup>1</sup> unless the context shows that another sense was intended, the word "village" shall mean incorporated village; "person"<sup>2</sup> includes a private corporation; "writing" includes printing; "oath" includes an affirmation; "insane" and "lunatic" include every species of mental derangement; "council," in cities which have a board of aldermen, includes common council; "property" includes real, personal, and mixed estates and interests; and "land" and "real estate"<sup>3</sup> include rights and easements of an incorporeal nature; but this enumeration shall not be construed to require a strict construction<sup>4</sup> of any other words in this title.

(1) This refers to Title XII, R. S.

(2) **Person** would not ordinarily include corporation. *State vs. Cincinnati Fertilizer Co.*, 24 O. S. 611. But see *Norris v. State*, 25 O. S. 217; see also *Allen v. State*, 10 O. S. 287; *Gardner v. Fayette Co.*, 16 O. S. 353; *Burke v. State*, 34 O. S. 79; *Hamilton v. State*, 34 O. S. 82.

(3) **Land and real estate.**—Meaning of, see *Dodson v. City*, 34 O. S. 276; *Valley Ry. Co. v. Pouchot*, 4 C. C. 187, 192; *Winton v. Cor-*

*nish*, 5 O. 477, 478; *Kerlin Bros. v. Toledo*, 20 C. C. 603.

(4) **Construction.**—General words are sometimes, by construction, limited in their scope, when taken in conjunction with their subject matter. *Aultman v. Seiberling*, 31 O. S. 201, 204; *Brigel v. Starbuck*, 34 O. S. 280, 285; see also *Board of Education v. Board*, 46 O. S. 595; *Goodall v. Gerke Brewing Co.*, 56 O. S. 257.

**Sec. 1537 R. S.** [As to publication of notices.] Where in this title a notice is directed to be published in a newspaper, and no such paper is published at the place mentioned, or if such newspaper is published at the place, but the publisher refuses, on tender of his usual charge for a similar notice, to insert the same in his newspaper, then a publication in any newspaper of

general circulation at such place, shall be sufficient; but nothing herein contained shall be construed to dispense with posters where they are provided for.<sup>1</sup>

(1) See § 124 of the Code.

**Sec. 1544 R. S. [Right of visitation.]** The general assembly of Ohio by a committee, the governor of the state, the council of the corporation by a committee, the mayor or police judge of the corporation, the board of health of the corporation, the judge of any court of this state, and the grand jury of the county, may, at any time, visit and inspect any of the benevolent or correctional institutions established by any municipal corporation, and examine the books and accounts of the same. [66 v. 272, § 724.]

## 2. ADVERTISING.

**Sec. 4366 R. S. [Rates for legal advertising.]** Publishers of newspapers may charge and receive for the publication of advertisements,<sup>1</sup> notices, and proclamations, the price or rate for which is not otherwise fixed by law, required to be published by any public officer of the state, or of a county, city, village, hamlet, township, school, benevolent, or other public institution, or by a trustee, assignee, executor, or administrator, the following sums, to-wit: For the first insertion, one dollar for each square, and for each additional insertion, authorized by law or the person ordering the insertion, fifty cents for each square, fractional squares to be estimated at the same rate for space occupied; and in advertisements containing tabular or rule work,<sup>2</sup> an additional sum of fifty per cent. may be charged in addition to the foregoing rates. [73 v. 75, § 1.]

(1) **Advertisement.** — Meaning (2) **Tabular work.** — Meaning of. of. See *Murray v. Auglaize Co.*, 13 *Ib.* Dec. 723.

**Sec. 4367 R. S. [What notices to be published in two newspapers.]**<sup>1</sup> Every proclamation for an election, order fixing the times of holding court, notice of the rates or taxation, bridge, pike, and notice to contractors, and such other advertisements of general interest to the tax-payers as the auditor, treasurer, probate judge, or commissioners may deem proper, shall be published in two newspapers of opposite politics, at the county seat,<sup>2</sup> if there be such published in the county seat, and in all counties having cities of eight thousand inhabitants or more, not the county seat of such counties, additional publication of such notices shall be made in two newspapers of opposite politics in such city; but this chapter shall not apply to the publi-



cation of notices of delinquent tax and forfeited land sales.<sup>3</sup>  
[1889, April 12: 86 v. 258; Rev. Stat. 1880; 73 v. 75, § 2.]

(1) **Validity.**—This act is not in contravention of the 14th amendment of U. S. constitution. State v. Comm'rs, 7 N. P. 239.

**seat.**—The requirement that publication be at the county seat, is mandatory. *Ib.*

(3) **Code provisions** on publication, see § 124,

(2) **Publication at county**

**Sec. 4369 R. S.** [What shall constitute a square in legal advertisements.] A square shall be considered and held to be a space occupied by two hundred and forty ems of the type used in printing such advertisements; and all legal advertising shall be set up in compact form, without any unnecessary spaces, blanks, or head lines, and shall be printed in type not smaller than non-pareil. [1880, March 6: 77 v. 40; Rev. Stat. 1880; 73 v. 75, § 3.]

**Sec. 4370 R. S.** [What is sufficient publication.] It shall be sufficient to publish any notice or advertisement required by law to be given for a definite period, if one side of the newspaper in which publication is made is printed in the county, municipal corporation, or state, in which the newspaper containing such notice or advertisement is required to be printed. [74 v. 208, § 1.]

### 3. BOUNDARIES OF TOWNSHIPS CHANGED.

**Sec. 1380 R. S.** [Change of boundaries in certain cases, or erection of new township.] If the limits of a municipal corporation do not comprise the whole of the established township or townships in which it is situated, or if by change of the limits of such corporation, or otherwise, they include territory lying in more than one township, and the council of such corporation shall in either case, by a vote of the majority of the members thereof, petition the commissioners of the proper county for a change of township lines so as to make them identical in whole or in part with the limits of the corporation, or to erect a new township out of the portion of said township or townships included within the limits of said municipal corporation, such board of county commissioners may, on presentation of such petition, with the proceedings of the council duly authenticated, at any regular or adjourned session, change the boundaries of the township or townships, or erect such new township accordingly.<sup>1</sup> [89 v. 63; 70 v. 4, § 480; (S. & C. 1548).]

(1) See notes to § 3 of the Code, n. 2.

**Sec. 1381 R. S.** [What to be done with parts of township left.] If, in making such change, any township not having within its limits a city or village is reduced in territory to less than twenty-two square miles, such township may be by the commissioners thereupon annexed to any contiguous township or townships, or the commissioners may annex thereto territory from any contiguous township or townships, and erect a new township, as in their opinion will best promote justice and public convenience; but if the majority of the householders of such reduced township outside the limits of such municipal corporation petition therefor, the commissioners may erect such reduced township into a new township. [89 v. 64; 70 v. 4. § 481; (S. & C. 1548).]

**Sec. 1382 R. S.** [How change made.] When the change of boundaries of townships is required under section *thirteen hundred and eighty*, by reason of the extension of the limits of a corporation, the change shall be made by annexation to the township in which the corporation, or the greater part of it, was before situate, of such parts of other townships as may be covered by such extension. [70 v. 4, § 482.]

**Sec. 1383.** [When corporation in two or more counties, where application to be made.] When the corporation is situate in two or more counties, the application authorized by section *thirteen hundred and eighty*, may be made to the commissioners of the county in which the change of boundaries is proposed, or if the change is to be made in two or more counties, then to the commissioners of the several counties in respect of the territory situate within them, respectively. [66 v. 149, § 483.]

#### 4. BRIERS AND CANADA THISTLES.

**Sec. 4730 R. S.** [Destruction of brush, briars, weeds, etc., on highways.] All pike superintendents and turnpike directors having control of and being charged with the duty of repairing macadamized, graveled and improved roads and turnpikes, all road superintendents of county and township roads and the street commissioners of any city or village shall between the first and twentieth days of June, and between the first and twentieth days of August, and if necessary, between the first and twentieth days of September of each year, cut and burn, or destroy, or cause the same to be done, all brush, briars, burrs, vines, Russian and Canadian or common thistle, or other noxious weeds, growing or being within the limits of

any county or township road, turnpike, improved, graveled or macadamized road, street, or alley within his jurisdiction;

[**Compensation.**] such road superintendent, turnpike director, or pike superintendent shall be allowed reasonable compensation which shall not exceed \$1.50 per day for all necessary labor employed by him in the performance of said work, to be allowed in the case of county and township out of the road fund, or general fund, and in the case of macadamized, graveled and improved roads and turnpikes, such labor is to be allowed and paid for out of the turnpike fund of the county and in the same manner as would be done in the event of a repair thereof, but a street commissioner shall be allowed and paid, for any such services performed by him, by the proper municipal authorities;

[**Owner or tenant may perform such labor; compensation.**] the superintendent of any such roads shall allow any land owner or tenant to cut and destroy any such brush, briers, burrs, vines, thistles or other noxious weeds, growing or being on such roads along the lands abutting on such roads owned or occupied by such land owner or tenant, but before the said work is performed shall fix a reasonable compensation therefor, which shall be credited on the road tax of that year assessed against said premises; provided, however, that such land owner or tenant shall do said work or cause the same to be done before the first day of the month in which such work is required to be done as specified in this section.

[**Destruction of briers, brush, etc., on toll roads and rail-ways; penalty.**] The superintendent, or manager of any toll, steam or electric road shall cut, burn or destroy, or cause the same to be done, all brush, briers, burrs, vines, Russian, Canada or common thistle, or other noxious weeds growing or being cut within the limits of any such road between the days of each month as above specified in this section, and in default thereof, and for five days thereafter, the trustees of any township through which any such road passes, shall cause the same to be done, and shall have the right of action against any such toll, steam or electric road company for the amount of such work, together with one hundred per cent. penalty, and cost of action to be recovered before any justice of the peace of such county. [98 v. 336; 95 v. 51; 94 v. 300; 93 v. 49; 90 v. 301; 81 v. 22; R. S. of 1880; 72 v. 11, § 1.]

**Sec. 4732 R. S.** [**Destruction of Canada or Russian thistles, wild lettuce or wild mustard growing on lands in townships.**]



The trustees of any township of this state upon information in writing, that Canada or Russian thistles, wild lettuce or wild mustard are growing on any lands in their township, and are about to spread or mature seed between the first day of June and the fifteenth day of October of each year, said trustees shall cause notice in writing to be served upon the owners, lessee, agent or tenant having charge of any such lands notifying such owner, lessee, agent, or tenant that Canada or Russian thistles or other noxious weeds mentioned in this section, are growing on such lands, and that such Canada thistles, or other noxious weeds, shall be cut and destroyed within five days after the service of such notice; and in default thereof, the said township trustees shall enter upon such lands and cut and destroy such thistles, or other noxious weeds; and that the cost of cutting the same with the cost of such notice, will become a lien against said lands. Any constable or deputy, marshal of any city or village, or deputy, is hereby authorized to make service and return of any such notice, and the fees of such service and return shall be the same as are allowed for service and return of summons in civil cases before magistrates. If any owner, lessee, agent or tenant having charge of any such lands, shall fail to comply with such notice, the township trustees shall cause said thistle or other noxious weeds aforesaid to be cut and destroyed, and may employ any person to perform such labor, and allow such person fifteen cents per hour for the time occupied in performing such labor, and pay the sum of such labor out of any money in the treasury of said township not otherwise appropriated, and take receipt for the same. Said township trustees shall make return in writing to the board of commissioners of their county, with a statement of the charges for their services, the amount paid to the person for performing such labor, together with the fees of the officers who made the service of notice and return with a proper description of the premises; and the same having been allowed, shall be entered upon the tax duplicate, and shall be a lien against said lands, from and after the date of such entry on the duplicate, and shall be collected as other taxes, and returned to the township with the general fund. [92 v. 106; 90 v. 302; 81 v. 17; Rev. Stat. 1880; 74 v. 144, § 1.]

**Sec. 4732a R. S.** [Destruction of Canada and common thistles and other noxious weeds within cities and villages other than Cincinnati, Cleveland, Columbus and Dayton.] That in all cities and incorporated villages, except cities of the first and second grade of the first class and first and second grade of the second class, the mayor shall, during the month of May of each year,

cause notice to be published for two consecutive weeks in one or more newspapers published in the corporation, or by posting up written or printed notices in said city or village at three public places for ten days next previous to the first day of June of each year, warning the owners, lessees or agents of lots and lands within such city or village to cause all Canada or common thistles, or other noxious weeds mentioned in section forty-seven hundred and thirty-two, growing on any such lots or lands within said corporation, to be cut and destroyed so that they do not mature seed or spread to adjoining lands. The common council of such city or village shall, upon information in writing that Canada or common thistles or other noxious weeds mentioned in section forty-seven hundred and thirty-two are growing on any such lands, within their corporation between the tenth day of June and the fifteenth day of October of each year, [shall] cause such Canada or common thistles or other noxious weeds to be cut and destroyed so that they do not mature seed or spread to other lands, and said council may employ any person to cut and destroy said noxious weeds and allow such person so employed fifteen cents per hour for the time employed in such labor. And said council shall pay said amount out of any money of the general fund in the treasury of said city or village not otherwise appropriated, and take a receipt therefor. And said council shall make return in writing to the board of commissioners of their county, with a statement of the amount paid for such labor, and one dollar additional, as a penalty on each lot or parcel of land containing less than one acre, and with two dollars on each lot or parcel containing more than one acre. The same having been allowed, the auditor shall enter the amount so certified to him on the tax duplicate of the county against the lots or lands on which said Canada or common thistles or other noxious weeds were cut and destroyed, and the amounts shall be a lien against said lots or lands from and after such entry, and shall be collected as other taxes are collected, and returned to such city or village with the general fund;

[Release of land on payment of costs of such destruction and penalty.] Provided, that [if] any such owner of such lots or lands shall tender to the treasurer of such township in cases of townships, or to the treasurer of such city or village in the case of city or village, the amounts so chargeable against such lots or lands for such labor, together with the penalty as certified to by the clerk of said township, city or village showing the amount of such charges and penalty, the treasurer shall re-

ceive the amount so tendered, upon which said lots and lands shall be discharged from further liability. [90 v. 303; 81 v. 24.]

**Sec. 4732b R. S. [Compensation of township trustees; penalty for not performing duties; disposition of fines.]** Township trustees shall be entitled to \$1.50 per day for their services under this act; the mayor of any city or village, or trustees of any township, or superintendent or other officer of any toll road, or superintendent of any improved or macadamized road, or supervisor of any county or township road, or street commissioner of any city or village, who neglects or refuses to perform their duties as mentioned in sections 4730, 4732 and 4732a, shall be fined in the sum of fifty dollars in any court having competent jurisdiction of such cases; such fines shall go into the road fund of the township in cases against township or toll road officers; and into the street fund in cases against mayors or other municipal officers. [90 v. 304.]

## 5. CIGARETTE-TAX DISTRIBUTION.

**Sec. 4364—40 R. S. [Distribution of tax and penalties; Hamilton county.]** That the revenues and fines resulting under the provisions of this act shall be distributed as follows,<sup>1</sup> to-wit: In every county, one-half of the money paid, as herein provided, into the county treasury on account of any business aforesaid carried on in any city, village, hamlet or township therein, shall be placed to the credit of the general revenue fund of the state, and be paid into the state treasury by the county treasurers, as is provided in other cases; one-fourth of the money so paid shall, upon the warrant of the county auditor, be paid on account of any business aforesaid carried on in any such municipal corporation, into the treasury of such corporation to the credit of the police fund thereof; provided, in corporations having no police fund, the entire one-fourth shall pass to the credit of the general revenue fund thereof; the remaining one-fourth part thereof, together with all other revenues resulting hereunder in said county, shall be passed to the credit of the poor fund of such county; provided, that in all counties in which there is no county infirmary, said remaining one-fourth part thereof shall be passed to the credit of the infirmary fund or poor fund of the township, village or city in which the same shall have been collected; and in such counties where the money is paid on account of any business carried on in any township outside of any such municipal corporation,



the said two-fourths shall be passed to the credit of the infirmary fund or the poor fund of said township; and provided, that in counties having a city of the first grade of the first class, with a city infirmary, the one-fourth part herein otherwise apportioned to the poor fund of the county, shall be divided between the city and county infirmary funds, in the proportion of the revenues received from the city to the revenue from the county outside the city. [91 v. 311; 90 v. 235.]

(1) **The act referred to** is part of the cigarette law §§ 4364-31 to 4364-41 R. S.

## 6. CURATIVE ACT.

**An act to carry into effect the intention both of officials and parties respecting certain county and municipal instruments and proceedings.**

[Sec. 1.] [Contract entered into and valid at time of making shall be deemed valid notwithstanding change in rule of judicial construction.] That whenever any officer or officers, board or board of officers, of any county, township, city or incorporated village have by resolution, ordinance, order or other proceeding, and in pursuance of any statutory legislation of this state, authorized or caused any county, township or municipal bonds or other obligations or instruments to be issued or executed and delivered, or any county, township or municipal contracts, grants, franchises, rights or privileges to be made or given which were valid according to any rule of judicial construction and adjudication of the state and prevailing at the date of any such action or proceeding, and loans or other things of value have been effected or acquired or expenditures have been made by other parties in reliance upon such construction or adjudication, then and in every such case said bonds, obligations, contracts, grants, franchises, rights and privileges and each of them, shall be deemed and held in all respects valid and binding notwithstanding such rule or judicial construction and adjudication as to such other similar legislation shall have been subsequently changed. [1902, May 9, 95 v. 444.]

## 7. FLAGS ON BUILDINGS.

**Sec. 803—1 R. S.** [Foreign flag forbidden on public buildings; exceptions.] It shall not be lawful to display the flag or

emblem of any foreign country upon any state, county or municipal building; provided, however, that whenever any foreigner shall become the guest of the United States, the state or any city upon proper proclamation by the governor or mayor of such city, the flag of the country of which such public guest shall be a citizen may be displayed upon such public buildings. [92 v. 89.]

**Sec. 803—2 R. S. [Penalty.]** Whoever violates any of the provisions of this act shall be fined not more than fifty dollars or be imprisoned thirty days or both. [92 v. 89.]

## 8. MILITIA; MOBS, RIOTS, ETC.

**Sec. 3096 R. S. [When militia required to aid civil authority.]** Whenever, in any county, there is a tumult, riot, mob, or any body of men acting together with intent to commit a felony, or to do or offer violence to person or property, or by force and violence to break or resist the laws of the state, or there is reasonable apprehension thereof, the commander-in-chief, the sheriff of the county, the mayor of any municipal corporation therein, or a judge of any court of the state or United States, may issue his call to the commanding officer of any regiment, battalion, company, troop, or battery, to order his command, or any part thereof, describing the same, to be and appear, at a time and place therein specified, to act in aid of the civil authority. [63 v. 70, § 43; S. & S. 458; (S. & C. 457).]

(1) **Cleveland City Guards act,**  
see Revised Statutes, §§ 3056-1 to  
3056-5a, inclusive.

**Sec. 3096a R. S. [In case of riot, mayor of municipal corporation may cause saloons to be kept closed.]** Whenever in any municipal corporation there is, in the opinion of the mayor of said municipal corporation, a tumult, riot, mob or any body of men acting together with intent to commit a felony or to do or offer to do violence to person or property, or by force and violence to wreck property and resist the laws of this state, or there is reasonable apprehension thereof, the mayor of said municipal corporation shall issue his proclamation requiring the keepers of all saloons, or places where intoxicating liquors are sold at retail as a beverage, to close such places of business and to keep said places of business closed during the continuance of such

above described disturbance, when the mayor shall withdraw his proclamation. Whoever keeps open such place, or fails to comply with such proclamation of said mayor, shall be fined not less than one hundred dollars, nor more than five hundred dollars, or imprisoned not less than ten days, nor more than thirty days, or both. [97 v. 142.]

**Sec. 3097 R. S. [Must obey call of the civil authority.]** The officer to whom the call is directed shall forthwith order the troops therein mentioned to parade at the time and place appointed; and if he neglect or refuse to obey, or if any officer refuse or neglect to obey any order issued in pursuance of such call, he shall be cashiered, and be further punished by fine, and imprisonment not exceeding six months, as a court-martial may adjudge; and an enlisted man who neglects or refuses to appear at the place of parade, or to obey any order issued in such case; or a person who advises or endeavors to persuade an officer or soldier to refuse or neglect to appear at such place, or to obey such order, shall be imprisoned not exceeding six months, or fined not exceeding one thousand dollars, or both. [63 v. 70, § 44; S. & S. 458.]

**Sec. 3098 R. S. [How the men must be notified to appear.]** Whenever the commanding officer of a company, troop, or battery orders out his command for such duty, he may order enlisted men to notify the men enrolled in such organization to appear at the time and place appointed, who shall give notice of such time and place of meeting, to each man personally, or by leaving at his usual place of abode a written or printed order, signed by the enlisted man serving the same, which notice shall be a sufficient warning. [74 v. 227 (238), § 45; (S. & S. 458).]

**Sec. 3099 R. S. [Penalties for disobedience of orders.]** Every enlisted man who refuses or neglects to serve such notice, when duly ordered so to do, and every officer or enlisted man who, having been served with notice as provided in the preceding section, refuses or neglects to obey the same promptly, shall pay not less than ten nor more than one hundred dollars, as may be adjudged by a court-martial. [63 v. 70, § 46; S. & S. 458; (S. & C. 456).]

## 9. MUSEUM AND PARK COMPANIES.

**Sec. 3868 R. S. [Museum, park, pond, and rink companies.]** When a corporation organized for the purpose of constructing



and conducting a museum to be used for the exhibition and preservation of works of nature and art, and for instruction in connection therewith, or a public hall of any kind, or a park, pond or rink to be used for skating or other lawful sports, or for holding fairs, festivals, public meeting, concerts or entertainments of any kind not prohibited by law, provides in its articles of incorporation that its buildings, or designated part thereof, shall be devoted to the use of the public for all purposes set forth in its articles, free from all costs, charges, and expense, except such as may be necessary for providing the means to keep such buildings, or such designated part thereof and its grounds in proper condition and repair, and to pay the expenses of insurance, care, management and attendance, so that the public may have the benefit thereof for all the legitimate uses set forth in its articles at as little expense as possible, and that no stockholder, subscriber, trustee, director or member shall receive any compensation, gain or profit from the corporation for such public use of its buildings or such designated part thereof, the authorities of any city, village or county in which the corporation is located, may appropriate to such use and grant the right and permit such corporation to erect and perpetually maintain its buildings on any of the parks, lands, lots or grounds which, or the use of which belong to or are subject to the control of such city, village or county or the authorities thereof, and to control the same on the terms and conditions which may be agreed upon between such public authorities and the corporation; and in every such case it shall be lawful for the public authorities and the said corporation to agree that additional trustees of said corporation may be appointed by such public authorities, and upon the number of such trustees and the method of their appointment, and they may agree that any officer or officers of said city, village or county to be designated by them may act ex-officio as such trustees. [(73 v. 8, § 1; 69 v. 20, § 1.) 1881, April 12: 78 v. 127; Rev. Stat. 1880.]

#### 10. NAME OF MUNICIPALITY, HOW CHANGED.

**Sec. 5852 R. S. [What names may be changed.]** The names of persons, the names of towns, villages, and hamlets, and the names of companies or associations incorporated in this state, may be changed in the manner provided in this chapter. [40 v. 28, § 1; 51 v. 293, § 1; 50 v. 274, § 77; S. & C. 1138; S. & C. 309; S. & C. 317.]

**Sec. 5854 R. S. [Proceeding to change name of town, village, or hamlet.]** Not less than twelve freeholders of the vicinity may file a petition in the court of common pleas of the county, for the change of the name of any town, village, or hamlet in such county, setting forth the reason why such change of name is desirable, and the name proposed to be substituted; and the court, upon being satisfied by proof, that the prayer of the petitioners is just and reasonable, that notice as required in the last section has been given,<sup>1</sup> that at least three-fourths of the inhabitants of such town, village, or hamlet desire such change, and that there is no other town, village, or hamlet in this state of the same name as that which is prayed for, may order such change of name. [40 v. 28, § 3; S. & C. 1138.]

(1) **Notice.**—The section referred to is § 5853 R. S., relating to change of name of persons and requires notice of the intended application to be given by one publica-

tion in a newspaper of general circulation in the county at least thirty days prior to the filing of the petition.

## 11. POUNDS.

**Sec. 4202 R. S. [Certain animals not to run at large; penalty.]**<sup>1</sup> No person or corporation being the owner or having the charge of any horses, mules, cattle, sheep, goats, swine, dogs or geese shall suffer the same to run at large<sup>2</sup> in any public road or highway, or in any street, lane or alley, or upon any uninclosed land or cause such animals to be herded, kept, or detained for the purpose of grazing the same on premises other than those owned or occupied by the owner or keeper of such animals, except as hereinafter provided; and any person violating the provisions of this section shall forfeit and pay for every such violation, as penalty therefor, not less than one dollar, nor more than five dollars,<sup>3</sup> continued violation, after notice, or prosecution, shall be held to be an additional offense for each and every day of such continuance. [93 v. 129; 78 v. 18; Rev. Stat. 1880; 62 v. 185, § 1, 56 v. 77, §§ 1, 2, 3; (S. & S. 7; S. & C. 76).]

(1) **Common law rule not adopted in Ohio.**—The common rule required the owner to restrain domestic animals, but this rule was not adopted in Ohio. *Railroad v. Stephenson*, 24 O. S. 48.

**Duties of road superintendents.**—For further provisions, see §§ 4203 to 4208 R. S.

(2) **No breach without negligence.**—The owner of domestic animals mentioned in this section, is not guilty of any breach if they be at large without the omission on his part of reasonable care: *Ib.*; *Railway v. Howard*, 40 O. S. 6; *Rutter v. Henry*, 46 O. S. 272; *Ru-*

di v. Lang, 12 C. C. 529. But see Morgan v. Hudnell, 52 O. S. 552.

And one finding an animal at large without negligence of the owner, cannot confine said animal until the owner tender compensation. Rutter v. Henry, 46 O. S. 272; Rudi v. Lang, 12 C. C. 529. *Contra*, Holtzkemper v. Langloth, 8 C. C. 520.

(3) **Liability of owner.**—Own-

er of domestic animal not generally liable for injury committed by such animal while in a place where it rightfully may be, unless owner knew of vicious propensities. Morgan v. Hudnell, 52 O. S. 552.

Nor is the owner of unenclosed land liable for injuries to cattle straying on same. Ferguson v. Miami Powder Co., 9 C. C. 445.

**Sec. 4207 R. S. [Animal running at large may be treated as stray; penalty.]** A person finding an animal mentioned in section forty-two hundred and two, at large,<sup>1</sup> contrary to the provisions of this chapter may, and any constable of any township, or any road superintendent in any township or village, or marshal or constable of any city or village, on view or information, shall take up and confine the same, forthwith giving notice thereof to the owner, if known, and if not known, by posting notices describing such animals therein, in at least three public places within the township; and if the owner does not appear and claim his property, and pay all charges for taking up, advertising, and keeping the same, within ten days from the date of the notice, the animals may be proceeded with under the laws regulating estrays; the mere act of any such animal running at large in or upon any of the places mentioned in section forty-two hundred and two, shall be prima facie evidence that such animal is so running at large contrary to the provisions thereof, but if it be proven that such animal escaped from the owner or keeper thereof, without his knowledge or fault, then it shall be given up to the owner or keeper, upon payment of a reasonable compensation for taking up and keeping the same. And if any constable, road superintendent or marshal, above named, shall wilfully neglect to perform any of the duties above required, he shall be fined not more than twenty-five dollars (\$25.00), or imprisoned not more than ten days or both. [1906, April 16, 98 v. 334; 81 v. 105; 72 v. 170.]

(1) **Cattle at large.**—Under provision of former act cattle running at large, with or without permission of the owner could be taken up. Sloan v. Hubbard, 34 O. S. 583.

And the right to take up animals running at large is not affected by

failure of township trustees to establish a pound. *Ib.*

A horse breaking out of an enclosed field, passing through an adjoining field and thence into another field, is not "at large" contrary to provision of § 4202 R. S.;



and no person is authorized to take up and confine it until the owner pay or tender compensation as provided by this section. *Rutter v. Henry*, 46 O. S. 272.

**Sec. 4209—1 R. S. [Pounds in incorporated villages.] § 1.** The council of any incorporated village may procure or construct an inclosure or pound wherein animals taken up within the said incorporated village, under the provisions of sections 4207 and 1692<sup>1</sup> of the Revised Statutes, may be confined, and like notices shall be given and like proceedings shall be had in such cases as are required by section 4207, Revised Statutes; and the council may appropriate from the general fund of such incorporated village an amount not exceeding one hundred dollars for said purpose. [90 v. 19.]

(1) § 1692 R. S. is repealed by the Code. See Code § 7 and note (1) thereunder, p. 43.

**Sec. 4209—2 R. S. [Pound in Columbus.] § 1.** The board of public works in cities of the first grade of the second class be and the same are hereby empowered to establish, construct and maintain pounds and appoint pound-masters in such cities; provided, however, that if the establishment, construction and maintenance of any one of such pounds, necessitates an expenditure at one time of more than five hundred dollars (\$500.00), the consent of the councils of such cities therefor shall be first obtained. [88 v. 121.]

**Sec. 4209a R. S. [Pounds in cities of third grade of first class (Toledo.)]** That in cities of the first class of the third grade, unless the common council of such city shall at all times maintain and continue an inclosure or pound, in which animals running at large, contrary to the provisions of the statutes of the state, and taken up by any person, shall, at all times, be received and detained until discharged or disposed of according to law, and in no other manner the prohibition in said section *four thousand two hundred and nine* against the taking up and confining such animals or stock in any private inclosure, shall have no force or effect in such city, but the right to confine such animals or stock in a private inclosure shall exist as though no public pound had been provided. [1880, April 17: 77 v. 311.]

## 12. SOCIETIES TO PREVENT CRUELTY.

**Sec. 3718 R. S. [Societies may appoint agents to enforce law; approval of appointment; salary of agent.]** Such associations<sup>1</sup> may appoint agents who shall be residents of the county or municipality for which the appointment is made for the purpose of prosecuting any person guilty of any act of cruelty to persons or animals within this state, who shall have power to arrest any person found violating any of the provisions of this chapter, or any other law for the purpose of protecting persons or animals or preventing any act of cruelty thereto; and upon making such arrest, such agent shall convey the person so arrested before some court or magistrate having jurisdiction of the offense, and there forthwith make complaint on oath or affirmation, of the offense; but all appointments by such associations under this section must have the approval of the mayor of the city or village for which the appointment is made, and if it exists outside of any city or village the appointment must be approved by the probate judge of the county for which the appointment is made, and the mayor or probate judge shall keep a record of all such appointments; provided that upon the approval of the appointment of any such agent or agents by the mayor of the city or village, the council of such city or village shall pay monthly to such agent or agents, out of the general revenue fund of such city or village, such salary as the council may deem just and reasonable; and upon the approval of the appointment of any such agent or agents by the probate judge of the county, the county commissioners shall pay monthly to such agent or agents, out of the general revenue fund of the county, such salary as the commissioners may deem just and reasonable; and provided further that the commissioners and the council of any such city or village may agree upon the amount each shall pay such agent or agents monthly, and the amount of salary to be paid monthly by the council of any such village to any such agent shall not be less than five dollars, by the council of any such city not less than twenty dollars, and by the commissioners of any such county not less than twenty-five dollars; provided that not more than one agent in each county shall receive remuneration from the county commissioners under the provisions of this section. [1906, March 14, 98 v. 43; 81 v. 181; 72 v. 129.]

(1) This refers to societies for the prevention of cruelty to animals.

## 13. SOLDIERS' MONUMENTS.

**Sec. 3107—19 R. S.** [Townships, cities, etc., may assist in building monuments; bonds therefor.] Whenever any township, incorporated village or city, in which a soldiers' monumental building, such as is contemplated in the act to which this is supplementary, is proposed to be created shall desire to unite in the erection of such building for township, village, or city purposes, each such township shall have a right to aid and assist in the same to an amount not exceeding twenty-five thousand dollars, and each city or incorporated village, to an amount not exceeding twenty-five thousand dollars, and to issue bonds therefor, payable in ten years from date of issue, and bearing interest at the rate of eight per cent. payable semi-annually, on the first days of July and January in each year until paid, and the faith and credit of the township, village, or city, shall be pledged for the full and faithful payment of the principal and interest upon said bonds, when and as the same may respectively become due by the terms of said bonds: provided, that any party uniting with the trustees of any fund described in the act to which this is supplementary, shall furnish an amount of money for the erection of said building equal at least to the amount furnished by said trustees of the monumental fund. [72 v. 60.]

**Sec. 3107—20 R. S.** [Question of issuing bonds must be submitted to vote; notice to be given.] No bonds shall be issued by any township, city, or incorporated village under the provision of this act until the question of issuing the same shall have been first submitted to a vote of the qualified electors of the township, city, or incorporated village, and a majority of such qualified electors voting at the election shall have voted "Monumental aid, Yes;" and such election may be held at the usual place of holding elections in said city, township, or incorporated village, at any time after ten days' notice of the time and place of holding the same shall have been publicly given by the trustees of the township, or council of the city or incorporated village, in one or more newspapers of the county having general circulation therein, stating also the amount of the bonds proposed to be issued, the rate of interest, the purpose for which issued, and the time of payment, and that each voter shall indorse upon his ballot, "Monumental aid, Yes," or "Monumental aid, No." Said election shall be conducted in all respects as other general or special elections held under the laws of this state; and the result thereof certified within three days thereafter by the proper officers,



with the poll books, to the clerk of the courts of the county, as is required in cases of a general election. [72 v. 60.]

**Sec. 3107—21 R. S. [Procedure on affirmative votes.]** If a majority of the votes cast at any such election shall be returned as cast for "Monumental aid, Yes," then it shall be the duty of the trustees of the township or council of the city or incorporated village, or both, as the case may be, forthwith on the certificate of the clerk of the court to that effect, to issue the bonds thereof in the sum specified in the notice for the election, payable in [ten] years from date, with interest at the rate of eight per cent. per annum, payable semi-annually, on the first days of July and January, at the place of issue, and to deliver the same to the trustees of the monumental building fund, provided for in the original act to which this is supplementary, and to take their receipt or that of their treasurer therefor. [72 v. 60.]

**Sec. 3107—22 R. S. [Duty of trustees in the erection of monument.]** That the trustees of said "Monumental building fund" upon receiving the bonds provided for in the preceding section, shall at once proceed to convert the same into money in any case for no less than their par value, and proceed at once to the erection of the monumental building provided for by the act to which this is supplementary, and also providing in said building all necessary and suitable rooms for township, city, or incorporated village purposes provided, that in giving notice of the time, manner, and purposes of election as provided in the second section [§(3107—20)] of this act, the number and character of rooms required for township, city or village purposes, may be therein described, and if so described, the bonds heretofore described shall in no event be issued or delivered until the trustees of said monumental building fund shall have given bond with security to the satisfaction of the probate judge of the county, conditioned for the speedy and faithful completion of rooms in said building, as stipulated in such notice, to the satisfaction of said probate judge, and the failure to so do will subject the property of said monumental building association to all damages that may arise from such failure as well as to liability upon bond of the trustees as aforesaid. [72 v. 60.]

**Sec. 3107—23 R. S. [Levy of tax for principal and interest.]** In case of the issue and delivery of bonds as aforesaid, it shall be the duty of the trustees of the township, or council of a city, or incorporated village, at the usual time for levying taxes, to levy a tax upon all the taxable property of such township, city,

or village, as will be sufficient to pay the interest thereon for the current year, and such proportional part of the principal for a sinking fund as will be sufficient to pay off the same when and as they become due, and this shall be done year by year until the whole amount of principal and interest is fully satisfied, paid off and discharged. [72 v. 60.]

**Sec. 3107—24 R. S.** [Vote to be taken on request of 20 citizens.] The vote required to be taken by this act shall be taken and notice therefor given as herein required immediately upon a request therefor being filed with the trustees of any township, or council, of any city or incorporated village, for ten days, by twenty citizens, residents and tax-payers of such township, city, or village, and notice to the clerk of such township, trustees, or council, shall be equivalent to service upon the trustees or council themselves. [72 v. 60.]

#### 14. TIMEPIECE ON PUBLIC BUILDINGS.

**Sec. 4446—4 R. S.** [Timepiece in or upon public building to keep central standard time.] Wherever there is a clock or other timepiece in or upon a public building within this state, the same being maintained at the public expense, it shall be the duty of the board of county commissioners, board of education, or other persons having control and charge of such building, to have said clock or other timepiece set and run according to the standard of time established by the act passed March 22, 1893, entitled "An act to establish a uniform system of keeping time throughout the state of Ohio." [§(4446-3.)] [92 v. 312.]

#### 15. TRUSTS FOR EDUCATIONAL PURPOSES.

**Sec. 4105 R. S.** [Board of education to have control and management of property held in trust for educational purposes, etc.; tax levy.] The custody, management and administration of any and all estates or funds, given or transferred in trust to any municipality for the promotion of education, and accepted by the council thereof, and any institution for the promotion of education heretofore or hereafter so founded other than a university as defined by this act, shall be committed to, and exercised by, the board of education of the school district including such municipality, and such board of education shall be held the representative and trustee of such municipality in the management and control of such estates and funds so held in trust and in the administration of such institution, excepting always

such funds and estates held by any municipality which are used to maintain a university as defined by this act. And for the uses and purposes of such board of education in administering such trusts, the council of such municipality may annually levy taxes on all the taxable property of such municipal corporation to the amount of three-tenths of one mill on the dollar valuation thereof.<sup>1</sup> [97 v. 544; 94 v. 241; 70 v. 117.]

(1) See § 217 of the code and sections re-enacted therein, p. 485 *et seq.*

See, as to effect of this section,

Waddick v. Merrill, 26 C. C. 437; 5 C. C. (N. S.) 103; State *ex rel.* v. Toledo, 26 C. C. 628; 5 C. C. (N. S.) 277.

## 16. VOTING ON SUBMITTED QUESTIONS.

**Sec. 2996—1 R. S.** [Majority of those voting on a question submitted means majority of all voters at the election.] In any and all cases where it is provided by statute that any question shall be submitted to the qualified voters of any township, village, county or city in the state of Ohio, and the statute so providing is silent as to the number of votes necessary to authorize the performing of the act voted upon, such statute shall be held to mean that a majority of all the qualified voters voting at said election must vote in favor thereof in order to authorize the same.<sup>1</sup> [90 v. 130.]

(1) **Meaning of majority.**—Where trustees are authorized to make a special levy but said levy not to be made until a majority of the electors of said township at some regular election, shall vote in favor of said levy, a majority of votes cast is required and not a majority voting for or against the levy. *Enyart v. Hanover Tp.*, 25 O. S: 618.

But where the majority votes cast are required to be in the affirmative, "majority votes" means majority of votes cast on the question. *Dexter v. Raine et al.*, 18 B. 61 (aff'd 18 B. 301). See also *State ex rel. v. Amlin*, 13 Dec. 334.

And a majority for a constitutional amendment is a majority of votes cast for senators and representatives. *State v. Foraker*, 46 O. S. 677.

**Sec. 2996—2 R. S.** [No special election for such question unless act so provides; proclamation.] Unless the act so providing for the submitting of any question to the qualified voters of any township, county, village or city also provides for the calling of a special election for that purpose, no special election shall be so called, and the question so to be voted upon shall be submitted at a regular election in such township, county, village or city, and notice that such question is to be voted upon shall be embodied in the proclamation for such election. [90 v. 130.]







# APPENDIX.

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## I

### GOVERNOR'S MESSAGE.

MESSAGE OF HON. GEORGE K. NASH, GOVERNOR OF OHIO, TO  
THE EXTRAORDINARY SESSION OF THE GENERAL ASSEMBLY,  
AUGUST 25TH, 1902.

*To the Seventy-fifth General Assembly:*

You have assembled upon the proclamation of the Governor. It is now my duty to state to you the purpose for which you have been convened.

1. On the 12th day of May, 1902, a bill became a law, entitled, "An act to amend section 6710 (as amended 93 O. L. 255), of the Revised Statutes of Ohio." Since that time this law has passed under the scrutiny of the Supreme Court and that tribunal found that it had been deprived of nearly all the appellate jurisdiction formerly possessed by it. If this act is permitted to stand, it will take from the people the right to have a large percentage of their civil cases reviewed on error by the highest court. I am informed, and I am constrained to believe, that it was not your wish, nor your intention, to do this. The error should be remedied as speedily as possible. I therefore recommend that the act of May 12th, 1902, above referred to, be repealed, and such additional legislation had as is necessary to restore to said court the jurisdiction which it possessed before the passage of said act, and to restore to litigants the same rights they would have had if said act had never been enacted.

2. During the last days of June the Supreme Court of the State handed down several decisions, which practically deprive our municipal corporations of all government. It is apparent that this is an extraordinary occasion which needs a remedy at the earliest possible moment. Constitutional government must be restored to our cities and villages. The labor demanded of us is not so much a work of construction as of readjustment. The question now is, not what we think would be a "model" municipal government, but what we can get, considering the constitutional limitations, and all the circumstances surrounding us. The task must be approached with a spirit of "give and take" and with a determination to accomplish something which will



bring order out of chaos. It is time enough to attempt to have our favorite ideas in regard to municipalities incorporated into law after order has been restored and when the General Assembly has ample time, at its regular session, to discuss and consider them.

Perhaps it will be beneficial in our work to recall, in a brief way, the history of municipalities and their government in Ohio. Under the old constitution, the General Assembly was left free to provide for any city or village such a government as it might wish. As a result they were given special charters, each differing from the other in many important particulars. Fifty years of experience demonstrated that this system was full of wrongs. The subject was carefully considered by the convention which made the constitution of 1851. The result of their labors was article 13 of that constitution, section 1 of which provides, "The General Assembly shall pass no special act conferring corporate powers," and section 6 of which reads, "The General Assembly shall provide for the organization of cities and incorporated villages by general laws, and restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent the abuse of such powers." These plain words indicate that the intention of the constitution is to command the General Assembly to provide for the government of cities by uniform and general laws. This command was fairly well obeyed for several years. Then, what seemed to be the wants and demands of the people caused a resort to various modes of classification. These grew to be absurd in their character. The government of one city no longer resembled the government of another. We were again in the midst of the evils that existed in Ohio prior to 1851. This transgression of the law of the constitution could not last forever. A crash must come, and it did come in June of this year.

In doing our work we should be careful to stand rigidly by the principles of the constitution. A departure from this course would make our work a nullity and continue indefinitely the confusion which now exists. It has been suggested, by very respectable people, that you can authorize the citizens of municipalities to do something that you cannot do yourselves; that you may empower the people of the eight hundred cities and villages in Ohio to assemble in constitutional conventions, and, each for itself, adopt a charter for its government. The result would be, as many schemes for the government of cities and villages as there are municipalities in the state. We would again be in the midst of the perils which surrounded our fathers in 1851, increased ten-fold, and would utterly disregard the command of our highest court, which says that we must have uniform and general laws for our government. I therefore recommend that no heed be given to this suggestion.

It is my duty to make affirmative recommendation to you in regard to this work. Such recommendations, to be helpful, must be definite and certain. That they may be of such character, I have devoted much time, thought and study to this subject, have called to my assistance skilled and learned men, and have prepared with their help a bill which contains all the matters and restrictions which I think should be embraced at this time in a law for the government of our cities and villages. I

submit the bill herewith, and hereby specifically recommend that all parts of said bill, and the bill as a whole, be made a part of the law of Ohio. If there are things in this bill which do not meet your approval, you will find it easy to make amendments, without being obliged to undergo the work of preparing a bill of great length. The subject which I have discussed herein is one of great importance. I do not wish unduly to influence your judgments, but I do ask that you give it most careful and thoughtful consideration, and then act as your consciences dictate.

It has been claimed that many of the school laws of the state are subject to the objection that they are violative of the provisions of the constitution. This may be true. It has not, however, been so declared by the Supreme Court. When this is done it is time to seek a remedy. When this court found that our municipalities were built upon false foundations, it stayed its hand, it delayed the operation of its decree, and gave us plenty of time to meet the emergency. We can safely rely upon this court to protect our public schools. They will not be struck down without ample opportunity to provide for the contingency.

The Supreme Court in its recent decisions has declared certain acts regulating the compensation of county officers to be unconstitutional. This subject does not need your immediate consideration. It makes but little difference, in a financial way, to the people whether their county officers are paid under the fee or the salary system. Therefore this subject can be safely postponed until the meeting of the next General Assembly.

It is also possible that there are imperfections existing in the registration and election laws, and also in the laws relating to the annual boards for the equalization of the valuation of property for taxation. I suggest that by joint resolutions you refer the school laws to the State Commissioner of Common Schools and the Attorney General; the laws relating to the compensation of county officers to the Auditor of State, Secretary of State and the Attorney General; the laws relating to registration and elections to the Secretary of State; and the laws relating to annual boards of equalization to the Auditor of State, with instructions to revise and recodify said laws, remove therefrom all imperfections, and have their work ready for presentation to the next General Assembly of Ohio, on the first Monday in January, 1904. The officers named are entirely familiar with these laws, and I am sure they would make a perfect revision of the same.

I most earnestly recommend that no subject of legislation be considered at this extraordinary session of the General Assembly, except those herein suggested.

Respectfully submitted,

GEO. K. NASH.

Columbus, O., August 25, 1902.



## II

# POPULATION OF MUNICIPAL CORPORATIONS OF OHIO.

AS SHOWN BY THE FEDERAL CENSUS OF 1900.

*Proclamation of the Secretary of State in compliance with Section 2 of the Municipal Code, passed October 22, 1902.*

In compliance with the provisions of Section 2 of an act of the General Assembly of Ohio entitled "An act to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent the abuse of such powers, as required by the constitution of Ohio, and to repeal all sections of the Revised Statutes inconsistent herewith," passed October 22, 1902, I, LEWIS C. LAYLIN, Secretary of State of the State of Ohio, do proclaim that the municipal corporations of Ohio which had a population of five thousand or over by the Federal Census of 1900, together with the population of said corporations, as shown by said census, are as follows:

| Name.                | County.          | Population,<br>1900. |
|----------------------|------------------|----------------------|
| Akron .....          | Summit .....     | 42,728               |
| Alliance .....       | Stark .....      | 8,974                |
| Ashtabula .....      | Ashtabula .....  | 12,949               |
| Bellaire .....       | Belmont .....    | 9,912                |
| Bellefontaine .....  | Logan .....      | 6,649                |
| Bowling Green .....  | Wood .....       | 5,067                |
| Bucyrus .....        | Crawford .....   | 6,560                |
| Cambridge .....      | Guernsey .....   | 8,241                |
| Canal Dover .....    | Tuscarawas ..... | 5,422                |
| Canton .....         | Stark .....      | 30,667               |
| Chillicothe .....    | Ross .....       | 12,976               |
| Cincinnati .....     | Hamilton .....   | 325,902              |
| Circleville .....    | Pickaway .....   | 6,991                |
| Cleveland .....      | Cuyahoga .....   | 381,768              |
| Columbus .....       | Franklin .....   | 125,560              |
| Conneaut .....       | Ashtabula .....  | 7,133                |
| Coshocton .....      | Coshocton .....  | 6,473                |
| Dayton .....         | Montgomery ..... | 85,333               |
| Defiance .....       | Defiance .....   | 7,579                |
| Delaware .....       | Delaware .....   | 7,940                |
| East Liverpool ..... | Columbiana ..... | 16,485               |
| Elyria .....         | Lorain .....     | 8,791                |



| Name.                  | County.          | Population,<br>1900. |
|------------------------|------------------|----------------------|
| Findlay .....          | Hancock .....    | 17,613               |
| Fostoria .....         | Seneca .....     | 7,730                |
| Fremont .....          | Sandusky .....   | 8,439                |
| Galion .....           | Crawford .....   | 7,282                |
| Gallipolis .....       | Gallia .....     | 5,432                |
| Glenville .....        | Cuyahoga .....   | 5,588                |
| Greenville .....       | Darke .....      | 5,501                |
| Hamilton .....         | Butler .....     | 23,914               |
| Ironton .....          | Lawrence .....   | 11,868               |
| Kenton .....           | Hardin .....     | 6,852                |
| Lancaster .....        | Fairfield .....  | 8,991                |
| Lima .....             | Allen .....      | 21,723               |
| Lorain .....           | Lorain .....     | 16,028               |
| Mansfield .....        | Richland .....   | 17,640               |
| Marietta .....         | Washington ..... | 13,348               |
| Marion .....           | Marion .....     | 11,862               |
| Martins Ferry .....    | Belmont .....    | 7,760                |
| Massillon .....        | Stark .....      | 11,944               |
| Middletown .....       | Butler .....     | 9,215                |
| Mt Vernon .....        | Knox .....       | 6,633                |
| Nelsonville .....      | Athens .....     | 5,421                |
| Newark .....           | Licking .....    | 18,157               |
| Newburg .....          | Cuyahoga .....   | 5,909                |
| New Philadelphia ..... | Tuscarawas ..... | 6,213                |
| Niles .....            | Trumbull .....   | 7,468                |
| Norwalk .....          | Huron .....      | 7,074                |
| Norwood .....          | Hamilton .....   | 6,480                |
| Painesville .....      | Lake .....       | 5,024                |
| Piqua .....            | Miami .....      | 12,172               |
| Portsmouth .....       | Scioto .....     | 17,870               |
| St. Marys .....        | Auglaize .....   | 5,359                |
| Salem .....            | Columbiana ..... | 7,582                |
| Sandusky .....         | Erie .....       | 19,664               |
| Sidney .....           | Shelby .....     | 5,688                |
| Springfield .....      | Clark .....      | 38,253               |
| Steubenville .....     | Jefferson .....  | 14,349               |
| Tiffin .....           | Seneca .....     | 10,989               |
| Toledo .....           | Lucas .....      | 131,822              |
| Troy .....             | Miami .....      | 5,881                |
| Urbana .....           | Champaign .....  | 6,808                |
| Van Wert .....         | Van Wert .....   | 6,422                |
| Warren .....           | Trumbull .....   | 8,529                |
| Washington C. H. ....  | Fayette .....    | 5,751                |
| Wellston .....         | Jackson .....    | 8,045                |
| Wellsville .....       | Columbiana ..... | 6,146                |
| Wooster .....          | Wayne .....      | 6,063                |
| Xenia .....            | Greene .....     | 8,696                |
| Youngstown .....       | Mahoning .....   | 44,885               |
| Zanesville .....       | Muskingum .....  | 23,538               |

I do further proclaim that the municipal corporations of Ohio which had a population of less than five thousand by the Federal Census of 1900, together with the population of such corporations, as shown by said census, are as follows:

| Name.                   | County.                  | Population,<br>1900. |
|-------------------------|--------------------------|----------------------|
| Aberdeen .....          | Brown .....              | 711                  |
| Ada .....               | Hardin .....             | 2,576                |
| Adamsville .....        | Muskingum .....          | 201                  |
| Addyson .....           | Hamilton .....           | 1,513                |
| Adelphi .....           | Ross .....               | 516                  |
| Albany .....            | Athens .....             | 548                  |
| Alexandria .....        | Licking .....            | 420                  |
| Alger .....             | Hardin .....             | 462                  |
| Allentown .....         | Allen .....              | 123                  |
| Alvordton .....         | Williams .....           | 482                  |
| Andover .....           | Ashtabula .....          | 815                  |
| Anna .....              | Shelby .....             | 451                  |
| Amelia .....            | Clermont .....           | *                    |
| Amesville .....         | Athens .....             | *                    |
| Ansonia .....           | Darke .....              | 676                  |
| Antioch .....           | Monroe .....             | 212                  |
| Antwerp .....           | Paulding .....           | 1,206                |
| Applecreek .....        | Wayne .....              | 387                  |
| Arcadia .....           | Hancock .....            | 425                  |
| Arcanum .....           | Darke .....              | 1,225                |
| Archbold .....          | Fulton .....             | 958                  |
| Arlington .....         | Hancock .....            | 738                  |
| Arlington Heights ..... | Hamilton .....           | 360                  |
| Arnettville .....       | Greene .....             | 157                  |
| Ashland .....           | Ashland .....            | 4,087                |
| Ashley .....            | Delaware .....           | 700                  |
| Asheville .....         | Pickaway .....           | 654                  |
| Athalia .....           | Lawrence .....           | 346                  |
| Athens .....            | Athens .....             | 3,066                |
| Attica .....            | Seneca .....             | 694                  |
| Bainbridge .....        | Ross .....               | 954                  |
| Bairdstown .....        | Wood .....               | 298                  |
| Baltimore .....         | Fairfield .....          | 460                  |
| Barbertown .....        | Summit .....             | 4,354                |
| Barnesville .....       | Belmont .....            | 3,721                |
| Barnhill .....          | Tuscarawas .....         | 811                  |
| Batavia .....           | Clermont .....           | 1,029                |
| Batesville .....        | Noble .....              | 312                  |
| Bay .....               | Cuyahoga .....           | *                    |
| Beach City .....        | Stark .....              | 364                  |
| Beallsville .....       | Monroe .....             | 554                  |
| Beaver .....            | Pike .....               | 262                  |
| Beaver Dam .....        | Allen .....              | 477                  |
| Bedford .....           | Cuyahoga .....           | 1,486                |
| Bellebrook .....        | Greene .....             | 352                  |
| Belle Center .....      | Logan .....              | 962                  |
| Belleville .....        | Richland .....           | 1,039                |
| Bellevue .....          | Huron and Sandusky ..... | 4,101                |
| Belmont .....           | Belmont .....            | 422                  |
| Belmore .....           | Putnam .....             | 334                  |

\* Population not given in census.

| Name.                  | County.          | Population,<br>1900. |
|------------------------|------------------|----------------------|
| Belpre .....           | Washington ..... | *                    |
| Beloit .....           | Mahoning .....   | *                    |
| Benton Ridge .....     | Hancock .....    | 359                  |
| Berea .....            | Cuyahoga .....   | 2,500                |
| Berlin Heights .....   | Erie .....       | 625                  |
| Bethel .....           | Clermont .....   | 850                  |
| Bettsville .....       | Seneca .....     | 492                  |
| Beverly .....          | Washington ..... | 712                  |
| Blakeslee .....        | Williams .....   | 239                  |
| Blake's Mills .....    | Tuscarawas ..... | *                    |
| Blanchester .....      | Clinton .....    | 1,788                |
| Bloomdale .....        | Wood .....       | 740                  |
| Bloomingsburg .....    | Fayette .....    | 636                  |
| Ploomville .....       | Seneca .....     | 819                  |
| Bluffton .....         | Allen .....      | 1,783                |
| Bond Hill .....        | Hamilton .....   | 1,081                |
| Boston .....           | Clermont .....   | 260                  |
| Botkins .....          | Shelby .....     | 420                  |
| Bourneville .....      | Ross .....       | 356                  |
| Bowerstown .....       | Harrison .....   | 526                  |
| Boliver .....          | Tuscarawas ..... | *                    |
| Bowersville .....      | Greene .....     | 370                  |
| Bradford .....         | Miami .....      | 1,254                |
| Bradner .....          | Wood .....       | 1,148                |
| Bremen .....           | Fairfield .....  | 466                  |
| Bridgeport .....       | Belmont .....    | 3,963                |
| Brilliant .....        | Jefferson .....  | 646                  |
| Brink Haven .....      | Knox .....       | 250                  |
| Brookside .....        | Belmont .....    | 249                  |
| Brookville .....       | Montgomery ..... | 869                  |
| Broughton .....        | Paulding .....   | 226                  |
| Bryan .....            | Williams .....   | 3,131                |
| Buckeye City .....     | Knox .....       | 247                  |
| Buckland .....         | Auglaize .....   | *                    |
| Burbank .....          | Wayne .....      | 325                  |
| Burton .....           | Geauga .....     | 727                  |
| Butler .....           | Harrison .....   | 567                  |
| Butlerville .....      | Warren .....     | 125                  |
| Bloomfield .....       | Jefferson .....  | *                    |
| Byesville .....        | Guernsey .....   | 1,267                |
| Cadiz .....            | Harrison .....   | 1,755                |
| Calais .....           | Monroe .....     | 114                  |
| Caldwell .....         | Noble .....      | 927                  |
| Caledonia .....        | Marion .....     | 682                  |
| Camden .....           | Preble .....     | 905                  |
| Canal Fulton .....     | Stark .....      | 1,172                |
| Canal Winchester ..... | Franklin .....   | 662                  |
| Canfield .....         | Mahoning .....   | 672                  |
| Cannelville .....      | Muskingum .....  | 281                  |
| Cardington .....       | Morrow .....     | 1,354                |
| Carey .....            | Wyandot .....    | 1,816                |
| Carlisle .....         | Lorain .....     | 164                  |
| Carroll .....          | Fairfield .....  | 223                  |
| Carrollton .....       | Carroll .....    | 1,271                |
| Carthage .....         | Hamilton .....   | 2,559                |

\* Population not given in census.



| Name.             | County.    | Population,<br>1900. |
|-------------------|------------|----------------------|
| Casstown          | Miami      | 262                  |
| Catawba           | Clark      | 231                  |
| Cecil             | Paulding   | 326                  |
| Cedarville        | Greene     | 1,189                |
| Celina            | Mercer     | 2,815                |
| Centerburg        | Knox       | 706                  |
| Centerville       | Montgomery | 198                  |
| Chagrin Falls     | Cuyahoga   | 1,586                |
| Chambersburg      | Callia     | 169                  |
| Chardon           | Geauga     | 1,360                |
| Chatfield         | Crawford   | 298                  |
| Chester Hill      | Hamilton   | 480                  |
| Chesterville      | Morrow     | 230                  |
| Chicago Junction  | Huron      | 2,348                |
| Chickasaw         | Mercer     | 310                  |
| Clarington        | Monroe     | 905                  |
| Clarksburg        | Ross       | 551                  |
| Clarksville       | Clinton    | 465                  |
| Cleveland Heights |            | *                    |
| Cleves            | Hamilton   | 1,328                |
| Clifton           | Hamilton   | 262                  |
| Clinton           | Huron      | 186                  |
| Cloverdale        | Putnam     | *                    |
| Clyde             | Sandusky   | 2,515                |
| Coalgrove         | Lawrence   | 1,191                |
| Coalton           | Jackson    | 1,625                |
| Coldwater         | Mercer     | 627                  |
| College Corner    | Preble     | 378                  |
| College Hill      | Hamilton   | 1,104                |
| Collinwood        | Cuyahoga   | 3,639                |
| Columbiana        | Columbiana | 1,339                |
| Columbus Grove    | Putnam     | 1,935                |
| Commercial Point  | Pickaway   | 245                  |
| Congress          | Wayne      | 198                  |
| Continental       | Putnam     | 1,104                |
| Convoy            | Van Wert   | 690                  |
| Coolville         | Athens     | 315                  |
| Copley            | Summit     | 243                  |
| Corning           | Perry      | 1,401                |
| Cortland          | Trumbull   | 620                  |
| Corwin            | Warren     | 131                  |
| Covington         | Miami      | 1,791                |
| Crestline         | Crawford   | 3,282                |
| Creston           | Wayne      | 893                  |
| Cridersville      | Auglaize   | 581                  |
| Crooksville       | Perry      | 835                  |
| Crown City        | Gallia     | 284                  |
| Cumberland        | Guernsey   | 618                  |
| Custar            | Wood       | 293                  |
| Cuyahoga Falls    | Summit     | 3,186                |
| Cygnet            | Wood       | 896                  |
| Dalton            | Wayne      | 666                  |
| Danville          | Knox       | 298                  |
| Darbyville        | Pickaway   | 250                  |
| Deavertown        | Morgan     | 154                  |

\* Population not given in census.

| Name.                | County.               | Population,<br>1900. |
|----------------------|-----------------------|----------------------|
| Deerfield .....      | Portage .....         | 484                  |
| Deersville .....     | Harrison .....        | 256                  |
| Degraff .....        | Logan .....           | 1,150                |
| Delhi .....          | Hamilton .....        | 829                  |
| Delroy .....         | Carroll .....         | 400                  |
| Delphos .....        | Van Wert and Allen... | 4,517                |
| Delta .....          | Fulton .....          | 1,230                |
| Dennison .....       | Tuscarawas .....      | 3,763                |
| Deshler .....        | Henry .....           | 1,628                |
| Dexter City .....    | Noble .....           | 278                  |
| Dillonvale .....     | Jefferson .....       | *                    |
| Donaldsville .....   | Clark .....           | 200                  |
| Doylestown .....     | Wayne .....           | 1,057                |
| Dresden .....        | Muskingum .....       | 1,600                |
| Dublin .....         | Franklin .....        | 275                  |
| Duncan's Falls ..... | Muskingum .....       | *                    |
| Dunkirk .....        | Hardin .....          | 1,222                |
| Dupont .....         | Putnam .....          | 370                  |
| East Cleveland ..... | Cuyahoga .....        | 2,757                |
| East Palestine ..... | Columbiana .....      | 2,493                |
| Eaton .....          | Preble .....          | 3,155                |
| Edgerton .....       | Williams .....        | 1,043                |
| Edison .....         | Morrow .....          | 347                  |
| Edon .....           | Williams .....        | 740                  |
| Eldorado .....       | Preble .....          | 358                  |
| Elgin .....          | Van Wert .....        | 208                  |
| Elida .....          | Allen .....           | 440                  |
| Elmore .....         | Ottawa .....          | 1,025                |
| Elmwood Place .....  | Hamilton .....        | 2,532                |
| Empire .....         | Jefferson .....       | *                    |
| Enon .....           | Clark .....           | 295                  |
| Evanston .....       | Hamilton .....        | 1,716                |
| Fairfield .....      | Greene .....          | 312                  |
| Fairpoint .....      | Pickaway .....        | *                    |
| Fairport .....       | Lake .....            | 2,073                |
| Fairview .....       | Guernsey .....        | 291                  |
| Farmersville .....   | Montgomery .....      | 440                  |
| Fayette .....        | Fulton .....          | 886                  |
| Fayetteville .....   | Brown .....           | 323                  |
| Felicity .....       | Clermont .....        | 695                  |
| Fernbank .....       | Hamilton .....        | 310                  |
| Five Points .....    | Pickaway .....        | 176                  |
| Fletcher .....       | Miami .....           | 375                  |
| Florida .....        | Henry .....           | 276                  |
| Flushing .....       | Belmont .....         | 653                  |
| Forest .....         | Hardin .....          | 1,155                |
| Fort Jennings .....  | Putnam .....          | 322                  |
| Fort Recovery .....  | Mercer .....          | 1,097                |
| Frankfort .....      | Ross .....            | 717                  |
| Franklin .....       | Warren .....          | 2,724                |
| Frazesburg .....     | Muskingum .....       | 730                  |
| Fredericksburg ..... | Wayne .....           | 511                  |
| Fredericktown .....  | Knox .....            | 890                  |
| Freeport .....       | Harrison .....        | 690                  |
| Freeport .....       | Wood .....            | 815                  |

\* Population not given in census.

| Name.                | County.                | Population,<br>1900. |
|----------------------|------------------------|----------------------|
| Gahanna .....        | Franklin .....         | 276                  |
| Gambier .....        | Knox .....             | 751                  |
| Garrettsville .....  | Portage .....          | 1,145                |
| Geneva .....         | Ashtabula .....        | 2,342                |
| Genoa .....          | Ottawa .....           | 524                  |
| Georgetown .....     | Brown .....            | 1,529                |
| Germantown .....     | Montgomery .....       | 1,702                |
| Gettysburg .....     | Darke .....            | 246                  |
| Gibsonburg .....     | Sandusky .....         | 1,791                |
| Gilboa .....         | Putnam .....           | 346                  |
| Girard .....         | Trumbull .....         | 2,630                |
| Gaun .....           | Knox .....             | *                    |
| Geyer .....          | Auglaize .....         | *                    |
| Glandorf .....       | Putnam .....           | 749                  |
| Glendale .....       | Hamilton .....         | 1,545                |
| Glenmont .....       | Holmes .....           | 209                  |
| Glouster .....       | Athens .....           | 2,155                |
| Gnadenhutten .....   | Tuscarawas .....       | 547                  |
| Gordon .....         | Darke .....            | *                    |
| Grafton .....        | Lorain .....           | 1,098                |
| Grand Rapids .....   | Wood .....             | 549                  |
| Granville .....      | Licking .....          | 1,425                |
| Graysville .....     | Monroe .....           | 174                  |
| Greencamp .....      | Marion .....           | 369                  |
| Greenfield .....     | Highland .....         | 3,979                |
| Green Spring .....   | Seneca and Sandusky .. | 816                  |
| Greenwich .....      | Huron .....            | 849                  |
| Grove City .....     | Franklin .....         | 656                  |
| Groveport .....      | Franklin .....         | 519                  |
| Grover .....         | .....                  | 308                  |
| Grover Hill .....    | Paulding .....         | 655                  |
| Hamden .....         | Vinton .....           | 838                  |
| Hamersville .....    | Brown .....            | 242                  |
| Hamler .....         | Henry .....            | 574                  |
| Hanging Rock .....   | Lawrence .....         | 665                  |
| Hanover .....        | Licking .....          | 314                  |
| Hanoverton .....     | Columbiana .....       | 399                  |
| Harlem Springs ..... | Carroll .....          | *                    |
| Harrisburg .....     | Franklin .....         | 247                  |
| Harrison .....       | Hamilton .....         | 1,456                |
| Harrisville .....    | Harrison .....         | 250                  |
| Harrod .....         | Allen .....            | 370                  |
| Hartford .....       | Licking .....          | 414                  |
| Hartwell .....       | Hamilton .....         | 1,833                |
| Harveysburg .....    | Warren .....           | 435                  |
| Haskins .....        | Wood .....             | 449                  |
| Haviland .....       | Paulding .....         | 186                  |
| Hayesville .....     | Ashland .....          | 332                  |
| Hebron .....         | Licking .....          | 455                  |
| Hemlock .....        | Perry .....            | 581                  |
| Hicksville .....     | Defiance .....         | 2,520                |
| Higginsport .....    | Brown .....            | 650                  |
| Hilliard .....       | Franklin .....         | 376                  |
| Hillsboro .....      | Highland .....         | 4,535                |
| Hiram .....          | Portage .....          | 659                  |

\* Population not given in census.



| Name.                 | County.    | Population,<br>1900. |
|-----------------------|------------|----------------------|
| Holgate               | Henry      | 1,237                |
| Hollansburg           | Darke      | 275                  |
| Holmesville           | Holmes     | 304                  |
| Holmes City           | Hamilton   | 868                  |
| Hopedale              | Harrison   | 365                  |
| Hoytsville            | Wood       | 431                  |
| Hubbard               | Trumbull   | 1,230                |
| Hudson                | Summit     | 983                  |
| Huntsville            | Logan      | 408                  |
| Huntersville          | Miami      | *                    |
| Huron                 | Erie       | 1,708                |
| Hyde Park             | Hamilton   | 1,691                |
| Irondale              | Jefferson  | 1,136                |
| Independence          | Cuyahoga   | *                    |
| Ithica                | Darke      | 113                  |
| Jackson               | Jackson    | 4,672                |
| Jacksonboro           | Butler     | 77                   |
| Jackson Center        | Shelby     | 644                  |
| Jacksonville          | Athens     | 1,047                |
| Jamestown             | Greene     | 1,205                |
| Jefferson             | Ashtabula  | 1,319                |
| Jeffersonville        | Fayette    | 790                  |
| Jenera                | Hancock    | 237                  |
| Jeromeville           | Ashland    | 308                  |
| Jerry City            | Wood       | 555                  |
| Jerusalem             | Monroe     | 245                  |
| Jewett                | Harrison   | 743                  |
| Johnstown             | Licking    | 638                  |
| Junction City         | Perry      | 443                  |
| Kalida                | Putnam     | 622                  |
| Kelley's Island       | Erie       | 1,174                |
| Kennedy Heights       | Hamilton   | 209                  |
| Kent                  | Portage    | 4,541                |
| Kettleville           | Shelby     | 145                  |
| Killbuck              | Holmes     | 370                  |
| Kimbalton             | Guernsey   | 245                  |
| Kingston              | Ross       | 735                  |
| Kirby                 | Wyandot    | 187                  |
| Kossuth               | Auglaize   | 153                  |
| Lafayette             | Allen      | 316                  |
| La Grange             | Lorain     | 528                  |
| Lakeview              | Cuyahoga   | 553                  |
| Lakewood              | Cuyahoga   | 3,355                |
| La Rue                | Marion     | 997                  |
| Latty                 | Paulding   | 444                  |
| Laura                 | Miami      | 378                  |
| Laurelville           | Hocking    | 450                  |
| Lebanon               | Warren     | 2,867                |
| Leesburg              | Highland   | 783                  |
| Leesville             | Carroll    | 269                  |
| Leesville Cross Roads | Crawford   | 178                  |
| Leetonia              | Columbiana | 2,744                |
| Leipsic               | Putnam     | 1,726                |
| Lewisburg             | Preble     | 560                  |
| Lewisville            | Monroe     | 170                  |

\* Population not given in census.

| Name.                  | County.                | Population,<br>1900. |
|------------------------|------------------------|----------------------|
| Lexington .....        | Richland .....         | 448                  |
| Liberty Center .....   | Henry .....            | 606                  |
| Limaville .....        | Stark .....            | 156                  |
| Linndale .....         | Cuyahoga .....         | *                    |
| Lindsey .....          | Sandusky .....         | 614                  |
| Lisbon .....           | Columbiana .....       | 3,330                |
| Lithopolis .....       | Fairfield .....        | 358                  |
| Little Sandusky .....  | Wyandot .....          | 181                  |
| Lockington .....       | Shelby .....           | 210                  |
| Lockbourne .....       | Franklin .....         | *                    |
| Lockland .....         | Hamilton .....         | 2,695                |
| Lodi .....             | Medina .....           | 846                  |
| Logan .....            | Hocking .....          | 3,480                |
| London .....           | Madison .....          | 3,511                |
| Loramie .....          | Shelby .....           | 444                  |
| Loudonville .....      | Ashland .....          | 1,581                |
| Louisville .....       | Stark .....            | 1,374                |
| Loveland .....         | Clermont and Warren... | 1,260                |
| Lowell .....           | Washington .....       | 381                  |
| Lowellville .....      | Mahoning .....         | 1,137                |
| Lower Salem .....      | Washington .....       | 190                  |
| Lucas .....            | Richland .....         | 306                  |
| Lynchburg .....        | Highland .....         | 907                  |
| Lyons .....            | Fulton .....           | *                    |
| McArthur .....         | Vinton .....           | 941                  |
| McClure .....          | Henry .....            | 660                  |
| McComb .....           | Hancock .....          | 1,195                |
| McConnelssville .....  | Morgan .....           | 1,825                |
| McGuffey .....         | Hardin .....           | 452                  |
| Macksburg .....        | Washington .....       | 448                  |
| Madison .....          | Lake .....             | 768                  |
| Madisonville .....     | Hamilton .....         | 3,140                |
| Magnetic Springs ..... | Union .....            | 194                  |
| Magnolia .....         | Stark .....            | 431                  |
| Maineville .....       | Warren .....           | 238                  |
| Malinta .....          | Henry .....            | 357                  |
| Malta .....            | Morgan .....           | 845                  |
| Malvern .....          | Carroll .....          | 709                  |
| Manchester .....       | Adams .....            | 2,003                |
| Mantua .....           | Portage .....          | 743                  |
| Marble Cliff .....     | Franklin .....         | *                    |
| Marblehead .....       | Ottawa .....           | 997                  |
| Marengo .....          | Jefferson .....        | 242                  |
| Marice City .....      | Putnam .....           | *                    |
| Marseilles .....       | Wyandot .....          | 251                  |
| Marshallville .....    | Wayne .....            | 357                  |
| Martinsburg .....      | Knox .....             | 238                  |
| Martinsville .....     | Clinton .....          | 338                  |
| Marysville .....       | Union .....            | 3,048                |
| Mason .....            | Warren .....           | 629                  |
| Maumee .....           | Lucas .....            | 1,856                |
| Mechanicsburg .....    | Champaign .....        | 1,617                |
| Medina .....           | Medina .....           | 2,232                |
| Melrose .....          | Paulding .....         | 383                  |
| Mendon .....           | Mercer .....           | 599                  |

\* Population not given in census.

| Name.                 | County.                 | Population,<br>1900. |
|-----------------------|-------------------------|----------------------|
| Mentor .....          | Lake .....              | 624                  |
| Metamora .....        | Fulton .....            | 263                  |
| Miamisburg .....      | Montgomery .....        | 3,941                |
| Middlepoint .....     | Van Wert .....          | 604                  |
| Middleport .....      | Meigs .....             | 2,799                |
| Middleburg .....      | Logan .....             | *                    |
| Midland .....         | Clinton .....           | 338                  |
| Midvale .....         | Tuscarawas .....        | 491                  |
| Midway .....          | Guernsey .....          | 274                  |
| Mifflin .....         | Ashland .....           | 185                  |
| Milan .....           | Erie .....              | 653                  |
| Milford .....         | Clermont .....          | 1,149                |
| Milford Center .....  | Union .....             | 682                  |
| Milbury .....         | Wood .....              | 284                  |
| Milledgeville .....   | Fayette .....           | 201                  |
| Miller City .....     | Putnam .....            | 163                  |
| Millersburg .....     | Holmes .....            | 1,998                |
| Milton Center .....   | Wood .....              | 325                  |
| Miltonsburg .....     | Monroe .....            | 130                  |
| Milton .....          | Mahoning .....          | *                    |
| Mineral City .....    | Tuscarawas .....        | 1,220                |
| Mineral Ridge .....   | Trumbull .....          | 831                  |
| Minerva .....         | Carroll and Stark ..... | 1,200                |
| Mingo Junction .....  | Jefferson .....         | 2,954                |
| Minster .....         | Auglaize .....          | 1,465                |
| Monroeville .....     | Huron .....             | 1,211                |
| Montezuma .....       | Mercer .....            | 317                  |
| Montpelier .....      | Williams .....          | 1,869                |
| Morristown .....      | Belmont .....           | 350                  |
| Morrow .....          | Warren .....            | 869                  |
| Moscow .....          | Clermont .....          | 475                  |
| Mt. Airy .....        | Hamilton .....          | 400                  |
| Mt. Blanchard .....   | Hancock .....           | 456                  |
| Mt. Cory .....        | Hancock .....           | 312                  |
| Mt. Eaton .....       | Wayne .....             | 232                  |
| Mt. Gilead .....      | Morrow .....            | 1,528                |
| Mt. Healthy .....     | Hamilton .....          | 1,354                |
| Mt. Oreb .....        | Brown .....             | 561                  |
| Mt. Pleasant .....    | Jefferson .....         | 626                  |
| Mt. Sterling .....    | Madison .....           | 986                  |
| Mt. Victory .....     | Hardin .....            | 734                  |
| Mt. Washington .....  | Hamilton .....          | 781                  |
| Murray City .....     | Hocking .....           | 1,118                |
| Mutual .....          | Champaign .....         | 163                  |
| Napoleon .....        | Henry .....             | 3,639                |
| Nashville .....       | Holmes .....            | 766                  |
| Navarre .....         | Stark .....             | 963                  |
| Nevada .....          | Wyandot .....           | 889                  |
| Neville .....         | Clermont .....          | 265                  |
| New Albany .....      | Franklin .....          | 224                  |
| New Alexandria .....  | Jefferson .....         | *                    |
| New Athens .....      | Harrison .....          | 435                  |
| New Bloomington ..... | Marion .....            | 399                  |
| New Bremen .....      | Auglaize .....          | 1,318                |
| New Carlisle .....    | Clark .....             | 995                  |

\* Population not given in census.



| Name.                  | County.                 | Population,<br>1900. |
|------------------------|-------------------------|----------------------|
| New Comerstown .....   | Tuscarawas .....        | 2,659                |
| New Concord .....      | Muskingum .....         | 675                  |
| New Waterford .....    | Columbiana .....        | *                    |
| New Holland .....      | Pickaway and Fayette .. | 692                  |
| New Knoxville .....    | Auglaize .....          | 436                  |
| New Lebanon .....      | Montgomery .....        | 145                  |
| New Lebanon .....      | Miami .....             | 224                  |
| New Lexington .....    | Highland .....          | 265                  |
| New Lexington .....    | Perry .....             | 1,701                |
| New London .....       | Huron .....             | 1,180                |
| New Madison .....      | Darke .....             | 590                  |
| New Matamoras .....    | Washington .....        | 817                  |
| New Paris .....        | Preble .....            | 790                  |
| New Petersburg .....   | Highland .....          | *                    |
| New Richmond .....     | Clermont .....          | 1,916                |
| New Riegel .....       | Seneca .....            | 298                  |
| New Salem .....        | Fairfield .....         | 180                  |
| New Straitsville ..... | Perry .....             | 2,302                |
| New Vienna .....       | Clinton .....           | 805                  |
| New Washington .....   | Crawford .....          | 824                  |
| Newton Falls .....     | Trumbull .....          | 732                  |
| Ney .....              | Defiance .....          | 289                  |
| North Amherst .....    | Lorain .....            | 1,758                |
| North Baltimore .....  | Wood .....              | 3,561                |
| North Bend .....       | Hamilton .....          | 532                  |
| North Lewisburg .....  | Champaign .....         | 846                  |
| North Robinson .....   | Crawford .....          | 200                  |
| Norwich .....          | Muskingum .....         | 253                  |
| Nottingham .....       | Cuyahoga .....          | 939                  |
| Oak Harbor .....       | Ottawa .....            | 1,631                |
| Oak Hill .....         | Jackson .....           | 825                  |
| Oakley .....           | Hamilton .....          | 528                  |
| Oakwood .....          | Paulding .....          | 342                  |
| Oberlin .....          | Lorain .....            | 4,082                |
| Ohio City .....        | Van Wert .....          | 862                  |
| Olmsted Falls .....    | Cuyahoga .....          | 330                  |
| Orangeville .....      | Trumbull .....          | *                    |
| Orville .....          | Wayne .....             | 1,901                |
| Osborn .....           | Greene .....            | 948                  |
| Osgood .....           | Darke .....             | 224                  |
| Osnaburg .....         | Stark .....             | 558                  |
| Ostrander .....        | Delaware .....          | 401                  |
| Ottawa .....           | Putnam .....            | 2,322                |
| Ottoville .....        | Putnam .....            | 369                  |
| Otwa .....             | Scioto .....            | 274                  |
| Oxford .....           | Butler .....            | 2,009                |
| Palestine .....        | Pickaway .....          | 210                  |
| Pandora .....          | Putnam .....            | 409                  |
| Pataskala .....        | Licking .....           | 675                  |
| Patterson .....        | Hardin .....            | 219                  |
| Paulding .....         | Paulding .....          | 2,080                |
| Payne .....            | Paulding .....          | 1,336                |
| Patriot .....          | Gallia .....            | *                    |
| Peebles .....          | Adams .....             | 763                  |
| Pemberville .....      | Wood .....              | 1,081                |

\* Population not given in census.

| Name.                 | County.                | Population,<br>1900. |
|-----------------------|------------------------|----------------------|
| Peninsula .....       | Summit .....           | 579                  |
| Perrysburg .....      | Wood .....             | 1,766                |
| Perrysville .....     | Ashland .....          | 513                  |
| Phillipsburg .....    | Montgomery .....       | *                    |
| Pickerington .....    | Fairfield .....        | 263                  |
| Piketon .....         | Pike .....             | 625                  |
| Pioneer .....         | Williams .....         | 603                  |
| Plain City .....      | Madison and Union....  | 1,432                |
| Plainfield .....      | Coshocton .....        | 255                  |
| Pleasant City .....   | Guernsey .....         | 1,006                |
| Pleasant Hill .....   | Miami .....            | 557                  |
| Pleasant Ridge .....  | Hamilton .....         | 953                  |
| Pleasantville .....   | Fairfield .....        | 501                  |
| Plymouth .....        | Richland and Huron.... | 1,154                |
| Poland .....          | Mahoning .....         | 370                  |
| Polk .....            | Ashland .....          | 232                  |
| Pomeroy .....         | Meigs .....            | 4,639                |
| Portage .....         | Wood .....             | 546                  |
| Port Clinton .....    | Ottawa .....           | 2,450                |
| Port Jefferson .....  | Shelby .....           | 355                  |
| Port Washington ..... | Tuscarawas .....       | 424                  |
| Port William .....    | Clinton .....          | 200                  |
| Proctorville .....    | Lawrence .....         | 523                  |
| Prospect .....        | Marion .....           | 983                  |
| Put-in-Bay .....      | Ottawa .....           | 317                  |
| Quaker City .....     | Guernsey .....         | 878                  |
| Quincy .....          | Logan .....            | 642                  |
| Racine .....          | Meigs .....            | 327                  |
| Rarden .....          | Scioto .....           | 443                  |
| Ravenna .....         | Portage .....          | 4,003                |
| Rawson .....          | Hancock .....          | 473                  |
| Reading .....         | Hamilton .....         | 3,076                |
| Rendville .....       | Perry .....            | 790                  |
| Republic .....        | Seneca .....           | 656                  |
| Reynoldsburg .....    | Franklin .....         | 339                  |
| Richmond .....        | Jefferson .....        | 373                  |
| Richmond .....        | Lake .....             | 332                  |
| Richwood .....        | Union .....            | 1,640                |
| Ridgeway .....        | Hardin and Logan....   | 447                  |
| Ripley .....          | Brown .....            | 2,248                |
| Rising Sun .....      | Wood .....             | 660                  |
| Riverside .....       | Hamilton .....         | *                    |
| Rochester .....       | Lorain .....           | 167                  |
| Rockcreek .....       | Ashtabula .....        | 478                  |
| Rockford .....        | Cuyahoga .....         | 1,207                |
| Rockport .....        | Cuyahoga .....         | 2,038                |
| Rocky Ridge .....     | Ottawa .....           | 414                  |
| Rocky River .....     | Cuyahoga .....         | 1,319                |
| Rogers .....          | Columbiana .....       | 287                  |
| Rome .....            | Adams .....            | *                    |
| Roseville .....       | Muskingum .....        | 1,207                |
| Rossville .....       | Darke .....            | 251                  |
| Rushsylvania .....    | Logan .....            | 552                  |
| Rushville .....       | Fairfield .....        | 257                  |
| Russellville .....    | Brown .....            | 394                  |

\* Population not given in census.

| Name.                  | County.               | Population,<br>1900. |
|------------------------|-----------------------|----------------------|
| Sabina .....           | Clinton .....         | 1,481                |
| St. Bernard .....      | Hamilton .....        | 3,384                |
| St. Clairsville .....  | Belmont .....         | 1,210                |
| St. Henry .....        | Mercer .....          | *                    |
| St. John .....         | Auglaize .....        | *                    |
| St. Louisville .....   | Licking .....         | 285                  |
| St. Paris .....        | Champaign .....       | 1,222                |
| Salesville .....       | Guernsey .....        | 286                  |
| Salineville .....      | Columbiana .....      | 2,353                |
| Sarahsville .....      | Noble .....           | 279                  |
| Savannah .....         | Ashland .....         | 290                  |
| Scio .....             | Harrison .....        | 1,214                |
| Sciotoville .....      | Scioto .....          | *                    |
| Scott .....            | Van Wert and Paulding | 547                  |
| Sebring .....          | Mahoning .....        | 387                  |
| Senecaville .....      | Guernsey .....        | 623                  |
| Seven Mile .....       | Butler .....          | 256                  |
| Seville .....          | Medina .....          | 602                  |
| Shanes Crossing .....  | Mercer .....          | *                    |
| Shanesville .....      | Tuscarawas .....      | *                    |
| Shawnee .....          | Perry .....           | 2,966                |
| Shelby .....           | Richland .....        | 4,685                |
| Sherrodsville .....    | Carroll .....         | 926                  |
| Sherwood .....         | Defiance .....        | 455                  |
| Shiloh .....           | Richland .....        | 597                  |
| Shreve .....           | Wayne .....           | 1,043                |
| Sinking Spring .....   | Highland .....        | 238                  |
| Smithfield .....       | Jefferson .....       | 503                  |
| Smithville .....       | Wayne .....           | 474                  |
| Somerset .....         | Perry .....           | 1,124                |
| Somerville .....       | Butler .....          | 300                  |
| South Bloomfield ..... | Pickaway .....        | 223                  |
| South Brooklyn .....   | Cuyahoga .....        | 2,343                |
| South Charleston ..... | Clark .....           | 1,096                |
| South Point .....      | Lawrence .....        | 281                  |
| South Solon .....      | Madison .....         | 319                  |
| South Salem .....      | Ross .....            | 264                  |
| South Webster .....    | Scioto .....          | 445                  |
| South Zanesville ..... | Muskingum .....       | *                    |
| Sparta .....           | Morrow .....          | 215                  |
| Spencerville .....     | Allen .....           | 1,874                |
| Springboro .....       | Warren .....          | 433                  |
| Spring Hills .....     | Champaign .....       | 157                  |
| Spring Valley .....    | Greene .....          | 522                  |
| Stockport .....        | Morgan .....          | 376                  |
| Strasburg .....        | Stark .....           | 461                  |
| Struthers .....        | Mahoning .....        | *                    |
| Stryker .....          | Williams .....        | 1,206                |
| Sugar Creek .....      | Tuscarawas .....      | *                    |
| Sugar Grove .....      | Fairfield .....       | 350                  |
| Summerfield .....      | Noble .....           | 511                  |
| Summerford .....       | Madison .....         | *                    |
| Sunbury .....          | Delaware .....        | 464                  |
| Swanton .....          | Fulton .....          | 887                  |
| Sycamore .....         | Wyandot .....         | 853                  |

\* Population not given in census.



| Name.                 | County.                     | Population,<br>1900. |
|-----------------------|-----------------------------|----------------------|
| Sylvania .....        | Lucas .....                 | 617                  |
| Syracuse .....        | Meigs .....                 | *                    |
| Tarleton .....        | Pickaway .....              | 388                  |
| Taylorville .....     | Muskingum .....             | 543                  |
| Terrace Park .....    | Clermont .....              | 290                  |
| Thorn .....           | Mahoning .....              | 374                  |
| Tippecanoe .....      | Miami .....                 | 1,703                |
| Tiro .....            | Crawford .....              | 293                  |
| Thornville .....      | Perry .....                 | *                    |
| Tontogany .....       | Wood .....                  | 352                  |
| Toronto .....         | Jefferson .....             | 3,526                |
| Trenton .....         | Tuscarawas .....            | *                    |
| Trotwood .....        | Montgomery .....            | 387                  |
| Trimble .....         | Athens .....                | 625                  |
| Tuscarawas .....      | Tuscarawas .....            | 412                  |
| Uhrichville .....     | Tuscarawas .....            | 4,582                |
| Union City .....      | Darke .....                 | 1,282                |
| Uniopolis .....       | Auglaize .....              | *                    |
| Uniontown .....       | Belmont .....               | 245                  |
| Unionville .....      | Union .....                 | 259                  |
| Upper Sandusky .....  | Wyandot .....               | 3,355                |
| Utica .....           | Licking .....               | 826                  |
| Van Buren .....       | Hancock .....               | 367                  |
| Vandalia .....        | Montgomery .....            | 284                  |
| Vanlue .....          | Hancock .....               | 356                  |
| Venedocia .....       | Van Wert .....              | 199                  |
| Vermilion .....       | Erie .....                  | 1,184                |
| Versailles .....      | Darke .....                 | 1,478                |
| Vienna .....          | Clark .....                 | *                    |
| Vinton .....          | Gallia .....                | 304                  |
| Wadsworth .....       | Medina .....                | 1,764                |
| Waldo .....           | Marion .....                | 278                  |
| Wapakoneta .....      | Auglaize .....              | 3,915                |
| Warsaw .....          | Coshocton .....             | 458                  |
| Washington .....      | Guernsey .....              | 374                  |
| Washingtonville ..... | Mahoning & Columbiana ..... | 1,092                |
| Waterville .....      | Lucas .....                 | 703                  |
| Wauseon .....         | Fulton .....                | 2,148                |
| Waverly .....         | Pike .....                  | 1,854                |
| Waynesburg .....      | Stark .....                 | 613                  |
| Waynesfield .....     | Auglaize .....              | 542                  |
| Waynesville .....     | Warren .....                | 723                  |
| Webster .....         | Darke .....                 | 204                  |
| Wellington .....      | Lorain .....                | 2,094                |
| West Alexandria ..... | Preble .....                | 740                  |
| West Cairo .....      | Allen .....                 | 338                  |
| West Carrollton ..... | Montgomery .....            | 987                  |
| West Chester .....    | Butler .....                | *                    |
| West Cleveland .....  | Cuyahoga .....              | *                    |
| West Elkton .....     | Preble .....                | 215                  |
| West Lafayette .....  | Coshocton .....             | *                    |
| Western Star .....    | Summit .....                | 148                  |
| Westerville .....     | Franklin .....              | 1,462                |
| West Farmington ..... | Trumbull .....              | 516                  |
| West Jefferson .....  | Madison .....               | 803                  |

\* Population not given in census.

| Name.                | County.          | Population,<br>1900. |
|----------------------|------------------|----------------------|
| West Leipsic.....    | Putnam .....     | 346                  |
| West Liberty.....    | Logan .....      | 1,236                |
| West Manchester..... | Preble .....     | 384                  |
| West Mansfield.....  | Logan .....      | 875                  |
| West Middleburg..... | Logan .....      | 288                  |
| West Millgrove.....  | Wood .....       | 236                  |
| West Milton.....     | Miami .....      | 904                  |
| Weston .....         | Wood .....       | 953                  |
| West Rushville ..... | Fairfield .....  | 161                  |
| West Salem.....      | Wayne .....      | 656                  |
| West Union.....      | Adams .....      | 1,033                |
| West Unity.....      | Williams .....   | 897                  |
| West Wheeling.....   | Belmont .....    | 444                  |
| Westwood .....       | Hamilton .....   | *                    |
| Wharton .....        | Wyandot .....    | 439                  |
| White House.....     | Lucas .....      | 621                  |
| Wilkesville .....    | Vinton .....     | 223                  |
| Williamsburg .....   | Clermont .....   | 1,002                |
| Williamsport .....   | Pickaway .....   | 547                  |
| Willoughby .....     | Lake .....       | 1,753                |
| Willshire .....      | Van Wert .....   | 560                  |
| Wilmington .....     | Clinton .....    | 3,613                |
| Wilmot .....         | Stark .....      | 354                  |
| Winchester .....     | Preble .....     | 375                  |
| Winchester .....     | Adams .....      | 796                  |
| Windham .....        | Portage .....    | 283                  |
| Winton Place.....    | Hamilton .....   | 1,219                |
| Woodsfield .....     | Monroe .....     | 1,801                |
| Woodstock .....      | Champaign .....  | 325                  |
| Woodville .....      | Sandusky .....   | 831                  |
| Worthington .....    | Franklin .....   | 443                  |
| Wren .....           | Van Wert .....   | 242                  |
| Wyoming .....        | Hamilton .....   | 1,450                |
| Yellow Springs.....  | Greene .....     | 1,371                |
| Yorkshire .....      | Darke .....      | *                    |
| Zaleski .....        | Vinton .....     | 577                  |
| Zanesfield .....     | Logan .....      | 278                  |
| Zoar .....           | Tuscarawas ..... | 290                  |

\* Population not given in census.

In testimony whereof I have hereunto subscribed  
my name and caused the seal of said office to  
be affixed this seventeenth day of November,  
A. D., 1902.

[SEAL]

LEWIS C. LAYLIN,  
Secretary of State.

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"An act to provide for detaching unplatted farm lands from cities and villages and for attaching the same to adjacent townships." Passed April 23, 1902. 95 O. L., 259; page 41.

"An act to amend sections 2835, 2836 and 2837 and repeal section 2837a of the Revised Statutes authorizing the issue of bonds by cities, villages, hamlets and townships." Passed April 29, 1902. 95 O. L., 318; page 287.

"An act to abolish grade crossings in municipalities." Passed May 2, 1902. 95 O. L., 356; page 691.

"An act to further provide for the transfer of public funds." Passed May 6, 1902. 95 O. L., 371; page 170.

"An act to authorize trustees of townships and councils of municipalities to make additional levy for the purpose of drilling an oil or gas well when authorized by vote of the electors of such township or municipality." Passed May 9, 1902. 95 O. L., 449; page 667.

"An act to provide for the cost of collecting, removing and disposing of garbage, dead animals and animal offal where provision could not be made therefor." Passed May 10, 1902. 95 O. L., 477; page 603.

"An act authorizing the issuing of bonds of municipal corporations for enlarging, improving or extending natural gas works, and providing for submitting, issuing the same to a vote of the people." Passed May 10, 1902. 95 O. L., 478; April 23, 1904, 97 O. L., 237; page 666.

"An act authorizing changes in (and) the extensions of existing street railway routes, and in existing transfer systems." Passed May 10, 1902. 95 O. L., 502; page 712.

"An act to create a bureau of inspection and supervision of public offices, and to establish a uniform system of public accounting, auditing and reporting, under the administration of the Auditor of State." Passed May 10, 1902. 95 O. L., 514; page 560.

"An act authorizing and directing the city auditors and accounting officers of municipal corporations to credit to the general fund all cash balances remaining in any fund which can no longer be used for the purpose for which it was created." Passed May 12, 1902. 95 O. L., 596; page 547.

"An act to create a board of supervision in the erection simultaneously of public municipal and county buildings." Passed May 6, 1902. 95 O. L., 879; page 737.

"An act authorizing the levy of taxes in municipalities to provide for firemen's, police and sanitary police pension or relief funds, and to create and perpetuate boards of trustees for the administration of such funds." Passed April 23, 1902. 95 O. L., 223; page 392.

"An act to authorize municipalities to construct and repair viaducts and to provide for the manner in which funds raised for such purpose shall be expended." Passed May 12, 1902. 95 O. L., 567; page 770.

"An act to authorize, upon certain conditions, the sprinkling of streets, avenues, alleys, public squares and public places in municipal corporations." Passed May 9, 1902. 95 O. L., 447; page 772.

"An act to provide for the appointment of a board of review for the equalization of real and personal property." Passed May 10, 1902. 95 O. L., 481; page 789.

"An act to carry into effect the intention both of officials and parties respecting certain county and municipal instruments and proceedings." Passed May 9, 1902. 95 O. L., 444; page 835.

"An act to confer jurisdiction upon police courts." Passed January 22, 1904, 97 O. L. 7; page 569.

"An act to provide for appropriation of private property in municipalities by corporations for street railway purposes." Passed April 17, 1904, 97 O. L. 106; page 711a.

"An act to provide how railroad and highway crossings may be constructed." Passed May 3, 1904, 97 O. L. 546; page 690b.

"An act to provide for village and township to jointly enlarge, improve or erect a public building." Passed April 26, 1904, 97 O. L. 483; page 737a.

"An act to authorize the councils of municipal corporations to permit the use of public buildings under their control." Passed April 23, 1904, 97 O. L. 278; page 738.

"An act to prevent loss of life in public halls and theaters." Passed April 23, 1904, 97 O. L. 264; page 743.

"An act to provide for the construction of sidewalks in villages." Passed April 26, 1904, 97 O. L. 481; page 774.

"An act to authorize the transfer of property by municipal corporations to trustees of libraries of school districts, and the acceptance of the same, and other property for library purposes by said trustees." Passed April 21, 1904, 97 O. L. 133; page 780.

"An act to authorize the council of any incorporated village in Ohio to levy an additional tax for fire protection purposes." Passed April 25, 1904, 97 O. L. 407; page 786.

"An act further to provide against the evils resulting from the traffic in intoxicating liquors by providing for local option in residence districts of municipal corporations." Passed April 4, 1906, 98 O. L. 68; page 809.

"An act to provide for the release and discharge of county, city, village, township and school district treasurers and their sureties in certain cases." Passed March 28, 1906, 98 O. L. 122; page 546.

"An act to provide for annual conferences of health officers." Passed April 16, 1906; 98 O. L. 205; page 604a.

"An act to grant to municipalities the right to require street railway companies to sprinkle their right of way within such municipality." Passed February 8, 1906; 98 O. L. 5; page 712.

"An act authorizing councils of municipalities to grant franchises to interurban railroads, using electric or other motive power, except steam, for the purpose of securing terminals in municipalities." Passed April 16, 1906; 98 O. L. 253; page 713.

"An act to authorize municipal corporations to contract to have treated with oil, for the purpose of laying the dust on, and preserving the surface of streets, avenues, alleys and public squares and places and roadways in public parks, and providing for the payment of the cost of such treatment by assessment on abutting property and from the corporation's funds." Passed March 14, 1906, 98 O. L. 50; page 772a.

"An act to authorize councils of villages to levy a tax for street lighting and fire protection." Passed March 14, 1906; 98 O. L. 46; page 787.





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